(12)

No. 00-1072-CFX Title: Leonard Edelman, Petitioner
v.
Lynchburg College

Docketed: January 5, 2001 Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	Jan 2 2001	Petition for writ of certiorari filed. (Response due February 20, 2001)
	Jan 18 2001	Order extending time to file response to petition until February 20, 2001.
	Feb 20 2001	Brief of respondent Lynchburg College in opposition filed.
	Mar 2 2001	Reply brief of petitioner Leonard Edelman filed.
	Mar 7 2001	DISTRIBUTED for Conference of March 23, 2001
	Mar 26 2001	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
	Jun 1 2001	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	Jun 5 2001	REDISTRIBUTED for Conference of June 21, 2001
	Jun 25 2001	Petition GRANTED. limited to Question 1 presented by the petition. SET FOR ARGUMENT January 8, 2002. **********
	Jul 10 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including August 30, 2001.
	Jul 30 2001	Order extending time to file respondent's brief on the merits to and including October 30, 2001.
	Aug 30 2001	Joint appendix filed.
	Aug 30 2001	Brief of petitioner Leonard Edelman filed.
	Aug 30 2001	Brief amici curiae of United States and Equal Employment Opportunity Commission filed.
	Aug 30 2001	Brief amicus curiae of National Employment Lawyers Association filed.
	Sep 12 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Sep 24 2001	Motion of the United States and the EEOC for leave to participate in oral argument as amici curiae and for divided argument DISTRIBUTED.
	Oct 1 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Oct 30 2001	Brief amicus curiae of Equal Employment Advisory Council filed.
	Oct 30 2001	Brief of respondent Lynchburg College filed.
	Nov 8 2001	CIRCULATED.
	Nov 29 2001	Reply brief of petitioner Leonard Edelman filed.
	Jan 2 2002	Lodging received from the Solicitor General consisting of 25 copies of Sections of the EEOC's Compliance Manual.
	Jan 8 2002	ARGUED.

(1)

Supreme Court, U.S.
FILED

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No. 00-

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED

(1) Is 29 C.F.R. § 1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," invalid?

(2) If section 1601.12(b) is invalid, is equitable tolling appropriate with regard to a charging party who relied on that regulation?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Leonard Edelman respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered on October 2, 2000.

OPINIONS BELOW

The October 2, 2000 opinion of the court of appeals, which is reported at 228 F. 3d 503 (4th Cir. 2000), is set out at pp. 1a-15a of the Appendix to this petition. The September 20, 1999 memorandum opinion of the district court, which is reported at 66 F. Supp. 2d 777 (W.D.Va. 1999), is set out at pp. 18a-25a of the Appendix. The September 20, 1999 order of the district court, which is not officially reported, is set out at pp. 16a-17a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on October 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATION INVOLVED

Section 706(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), states in pertinent part, "Charges shall be in writing under oath and shall contain such information and be in such form as the Commission requires."

Section 706(e)(1), 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days

after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 1601.12(b) of 29 C.F.R. provides in pertinent part:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.

STATEMENT OF THE CASE

Petitioner Leonard Edelman was hired in 1993 as a member of the biology faculty at respondent Lynchburg College. In 1996 he applied for tenure. Despite favorable recommendations from the chair of his department and a faculty committee, on June 6, 1997 the president of the college advised Edelman by letter that tenure had been denied. As a result of that denial of tenure, Edelman's employment by the college ended.

On November 14, 1997, Edelman sent to the Richmond office of the EEOC a five page single-spaced letter alleging that the denial of tenure and consequent dismissal were the result of discrimination on the basis of gender, religion and national origin. (Pet. App. 2a). The letter asserted that the Dean of the college had been systematically purging white men from the faculty, and concluded:

> I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case . . .

(Pet. App. 2a). The letter was not submitted under oath.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC. It requested that an agency investigator

interview Edelman prior to serving final charging documents on the college. This letter cautioned,

> It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.

(Pet. App. 2a). EEOC officials never disputed the attorney's understanding that the November 14 letter had constituted a Title VII charge.

EEOC did not schedule the requested interview until March 3, 1998. On March 18, 1998, the EEOC mailed to Edelman for his signature under oath an EEOC Form 5, Charge of Discrimination, it had prepared based on his allegations. The accompanying letter characterized Edelman's earlier letter as a "charge of employment discrimination," and set no deadline for the return of that Form. Edelman's verified Form 5 was filed with the EEOC on April 15, 1998. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging a violation of Title VII and of a variety of state law claims. Lynchburg college removed the action to federal court. The College moved to dismiss the Title VII claim on the ground that Edelman had failed to file a timely charge of discrimination.

Under the terms of Title VII, Edelman was obligated to file such a charge within 300 days of the June 6, 1997 letter notifying him of the denial of tenure. Edelman's November 14, 1997 letter fell well within the limitations period, but the verified Form 5 was not received until 313 days after June 6, 1997. (Pet. App. 3a). Officials at the EEOC's Richmond office submitted declarations stating that the substantive allegations of the November 14, 1997 letter were sufficiently detailed to constitute a charge, and that the EEOC had regarded the verified Form 5 as relating back to the earlier letter.[1]

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[1] J. App. 80-81, 90-91.

The district court dismissed Edelman's Title VII claims on the ground that he had not filed a timely Title VII charge, and remanded his remaining state law claims to state court. On appeal, the Fourth Circuit concluded that the controlling problem was that the November 14 "letter was not sworn to under oath or affirmation." Section 706(b) states that a charge "shall be in writing under oath or affirmation." (Pet. App. 4a). Edelman relied on an EEOC regulation which permits such a lack of verification to be corrected by a later sworn statement. "A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received." 29 C.F.R. § 1601.12(b).

The appeal thus turned on a dispute regarding the validity of this EEOC regulation.

> The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

(Pet. App. 4a). A majority of the court of appeals concluded that the regulation was invalid, insisting that the language of Title VII unambiguously required that the EEOC receive a sworn charge within the 300 day limitation period. (Pet. App. 6a). The majority opinion acknowledged that its analysis "conflicts with that of several other circuits" which had upheld the regulation in question. (Pet. App. 9a).

The majority also rejected Edelman's argument that his reliance on the disputed regulation warranted equitable tolling. (Pet. App. 12a). In a concurring opinion, Judge Luttig argued that the regulation was valid, but would on other grounds have affirmed the dismissal of the Title VII claims. (Pet. App. 14a-15a).

REASONS FOR GRANTING THE WRIT

There is a Conflict among the Circuits Regarding the Validity of an Important EEOC Regulation

The Fourth Circuit has declared invalid a 34 year old[2] EEOC regulation of great practical importance to the manner in which that agency carries out its statutory responsibilities. The EEOC receives each year more than 30,000 charges subject to the Title VII administrative processes.[3] Although section 706(b) of Title VII requires that charges be under oath, virtually none of the charging parties know this when they first contact EEOC;[4] often, as here, aggrieved individuals write letters to the nearest EEOC office. Pursuant to 29 C.F.R. § 1601.12(b), the EEOC has since 1966 deemed any written charge sufficient to meet the applicable filing deadlines, so long as a sworn charge is ultimately submitted; that verification is treated under the regulation as relating back to the date of the original written charge. The court of appeals, in declaring invalid section 1601.12(b), has overturned this long established agency regulation and practice.

The conflict among the circuits about this issue is now widely recognized. In its decision below, the Fourth Circuit expressly disagreed with contrary decisions in the Fifth, Seventh, Ninth and Tenth Circuits.[5]

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[2] The regulation at issue was originally promulgated by the EEOC on July 29, 1966. 31 Fed. Reg. 10269 (1966). Prior to 1977 it was set forth in 29 C.F.R. § 1601.11(b)(1975).

[3] Employment discrimination charges under the Americans With Disabilities Act are enforced through the Title VII processes. In fiscal year 1999 the EEOC received 17,007 Title VII charges and 17,883 charges under the ADA.

[4] The current EEOC website posting regarding the filing of an administrative charge makes no mention of this requirement. Rather, it simply invites aggrieved persons, inter alia, to write to the nearest EEOC office. http://www.eeoc.gov/.

[5] Pet. App. 9a (disagreeing with the decisions in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991), *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989), *Casavantes v. California State Univ.*, 732 F. 2d 1441 (9th Cir. 1984), and *Price v. Southwestern Bell Tel. Co.*, 687 F. 2d 74 (5th Cir. 1982).

> [W]e are mindful that our analysis conflicts with that of several other circuits. . . . Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. . . . We disagree with these decisions . . . because we believe that they improperly substitute policy justifications for clear statutory language.

(Pet. App. 9a-11a). The court below was particularly critical of the contrary decision of the Seventh Circuit in *Philbin v. General Electric Capital Auto Lease*, 929 F. 2d 321 (7th Cir. 1991). (Pet. App. 9a-11a).[6]

The Eighth and Tenth Circuits have also recognized the existence of this conflict. The problem often arises when a complainant visits an EEOC office and fills out an EEOC "intake questionnaire", which is not verified; agency officials then use the questionnaire to prepare a second document the complainant then signs under oath. Frequently, only the Intake Questionnaire is signed prior to the expiration of the time period for filing a Title VII complaint.

> Courts are split on how to deal with the two documents. The Eighth Circuit generally rejects the notion that they should be read together such that a verified charge filed after the filing deadline relates back to the intake questionnaire and makes the questionnaire a timely filed charge. . . . The Seventh Circuit has held that a timely filed questionnaire followed by an untimely but verified charge 'may be sufficient to constitute a charge in some circumstances,' *Philbin* . . . .

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[6] "The court [in *Philbin* and *Choate*] . . . stated that the verification requirement was 'directory and technical rather than mandatory . . .' . . . . In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII 'is cast in mandatory terms.' . . . In applying the Chevron analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute."(Citations omitted).

Welsh v. City of Shawnee, 1999 WL 345597 *5 n. 6 (10th Cir. 1999); *see Shempert v. Barwick Chemical Corp.*, 151 F. 3d 793, 796-97 n. 7 (8th Cir. 1998);[7] *Diez v. Minnesota Min. and Mfg. Co.*, 88 F. 3d 672, 675 and n. 4 (8th Cir. 1996).[8]

In the instant case the Fourth Circuit concluded that section 1601.12(b), insofar as it authorizes a later-filed sworn charge to relate-back to an earlier timely but unsworn charge, is invalid.[9] The Eighth Circuit has reached the same result, holding that the terms of Title VII itself preclude any such relation-back of a later verification, and noting--but refusing to apply--section 1601.12(b). *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793, 796 and n. 7 (8th Cir. 1998)(noting conflict); *Schlueter v. Anheuser-Busch, Inc.*, 132 F. 3d 455, 458 (8th Cir. 1998)(panel "bound by Eighth Circuit case law" and prefacing quotation from regulation with "But, cf."); *Diez v. Minnesota Min. and Mfg. Co.*, 88 F. 3d 672, 675 (8th Cir. 1996)(same); *Hodges v. Northwest Airlines, Inc.*, 990 F. 2d 1030, 1032 (8th Cir. 1993)(citing Fourth Circuit precedent).

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[7] "Several circuits hold that an Intake Questionnaire cannot serve as an administrative charge. *See . . . EEOC v. Appalachian Power Co.*, 568 F. 2d 354, 355 (4th Cir. 1978) . . . . Other circuits have held that a timely-filed Intake Questionnaire can serve as an administrative charge if subsequently verified. *See Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991) . . . ; *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989) . . . . Still other circuits have held that an Intake Questionnaire qualifies as a charge if it satisfied the requirements of 29 C.F.R. § 1601.12(b). *See Clark v. Coats & Clark, Inc.*, 865 F. 2d 1237, 1239-41 (11th Cir. 1989) . . .; *Casavantes v. California State Univ.*, 732 F. 2d 1441 (9th Cir. 1984)."

[8] After noting that Eighth Circuit precedent rejected relation-back of a subsequent verification, the court noted that there were decisions to the contrary in the Seventh, Ninth and Tenth circuits.

[9] "[H]aving concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. . . . In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter."

The EEOC has repeatedly, but without success, urged the Eighth Circuit to apply section 1601.12(b).[10]

On the other hand, a total of seven other circuits have held that the subsequent filing of a verified but untimely charge will relate back to an earlier, timely but unsworn complaint. In the years immediately following the enactment of Title VII, the statute itself was universally interpreted in this manner.[11]

The Fifth, Seventh, and Tenth Circuits have expressly rejected challenges to the validity of section 1601.12(b). *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321, 323 (7th Cir 1991)(disapproving district court decisions which had held regulation invalid; "EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfied the statutory requirement"); *Peterson v. City of Wichita*, 888 F. 2d 1307, 1308-09 (10th Cir. 1989)(reversing district court decision which had held regulation invalid; "an unverified charge is a timely filing if it is subsequently amended by a charge executed under oath or affirmation"); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 466 (5th Cir. 1969)(noting that earlier Fifth Circuit decisions had "approved the EEOC's regulation"); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230-31 (5th Cir. 1969)(affirming district court decision which "sustained the validity of" the predecessor of section 1601.12(b)).[12]

The Seventh and Tenth Circuits have concluded, contrary to the decision below, that the EEOC interpretation of Title VII embodied in section 1601.12(b) is entitled to substantial

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[10] Brief of the EEOC as Amicus in Support of Appellant, Shempert v. Harwick Chemical Corp., No. 97-1634 (8th Cir.); Brief of the EEOC as Amicus Curiae, Schlueter v. Anheuser-Busch, Inc., No. 97-1603 (8th Cir.); Brief of the EEOC as Amicus in Support of the Appellant, Lawrence v. Cooper Communities, Inc., No. 97-1338 (8th Cir.).

[11] *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969)(citing cases); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 266 (5th Cir. 1969); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230-31 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357, 359-60 (7th Cir. 1968).

[12] See *Price v. Southwestern Bell Telephone Co.*, 687 F. 2d 74, 77 (5th Cir. 1982)(applying regulation.)

deference. *Philbin*, 929 F. 2d at 324 ("we should give deference to the EEOC's interpretation"); *Peterson*, 888 F. 2d at 1309 (stressing this Court's admonition that "the EEOC's interpretation of Title VII is entitled to deference if it is reasonable.")

The linchpin of the Fourth Circuit's decision in the instant case was its view that Title VII unambiguously precludes relation-back of a later-filed sworn charge. (Pet. App. 5a-6a). The Fifth[13], Sixth[14] and Seventh[15] Circuits have held, to the contrary, that Title VII permits such relation-back even in the absence of the regulation. On this view, EEOC is required to do what the Fourth Circuit decision forbids--treat as sufficient an unsworn charge if a later verified charge is filed.

In addition to these circuits, decisions in the Second, Ninth and District of Columbia Circuits have applied or cited with approval the relation-back provision of section 1601.12(b). *Simpkins v. Washington Metropolitan Area Transit Authority*, 1997 WL 702349 * 3(D.C.Cir. 1997); *Casavantes v. California State University, Sacramento*, 732 F. 2d 1441, 1443 (9th Cir. 1984); *EEOC v. Sears, Roebuck & Co.*, 650 F. 2d 14, 18 (2d

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[13] *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 231 (5th Cir. 1969)(quoting Seventh Circuit opinion in *Choate*).

[14] *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969)("a reading of the entire statute makes it clear that the Congressional intent in requiring an oath is to prevent the harassment of respondents by reckless charges. However, this purpose can be served by requiring verification before action is taken by the Commission . . . . Accordingly, courts have consistently held that a charge filed within [the limitations period] need not be accompanied by the oath of the complainant. Sworn verification may occur later.")

[15] *Philbin*, 929 F. 2d at 324 ("While the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period"); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357, 359-60 (7th Cir. 1968)("When the statute is thus considered, it is clear that the requirement for verification of charges lodged with the Commission relates solely to the administrative rather than to the judicial features of the statute. We believe that the provision is directory and technical rather than mandatory and substantive. . . . If the Commission undertakes to process a charge which is not 'under oath,' we perceive no reason why the district court should not treat the omission of the oath as a permissive waiver by the Commission.")

Cir. 1981). Many of the decisions in other circuits have upheld as sufficient under Title VII complaints, as here, contained in unsworn letters to the EEOC. *E.g.*, *Simpkins v. Washington Metropolitan Area Transit Authority*, 1997 WL 702349 * 3 (D.C.Cir. 1997); *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 356 (6th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 464 (5th Cir. 1969).

The decision of the Fourth Circuit requires a basic change in the manner in which the EEOC processes letters, Intake Questionnaires, and other written complaints from discrimination victims in that circuit. Until now, pursuant to section 1601.12(b), the EEOC has had a uniform national processing system, under which an unsworn but otherwise sufficient written complaint was deemed to satisfy the Title VII filing deadlines. The EEOC Compliance Manual, for example, specifically directs agency employees to treat a letter to the Commission as a charge.[16] EEOC officials, as here, contact the complainant, obtain any useful clarification or additional details, and then embody all relevant information in an EEOC-drafted charge to be sworn to by the complainant. In the EEOC's fifty local offices, agency officials, discrimination victims and attorneys alike have relied on this legal scheme, focusing their attention on the substance of the charge, confident that the filing deadline had already been satisfied.

The decision of the Fourth Circuit threatens in several ways this longstanding legal scheme. First, the EEOC can no longer utilize a single national processing scheme; now the agency must process differently complaints from employees in the five states in the Fourth Circuit. The use of informal Intake Questionnaires would probably have to be abandoned in favor

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[16] EEOC Compliance Manual, Volume I, § 1.6(a) at 1:0002 (12/92)(BNA):

> "Correspondence is considered a charge if it contains a Title VII or ADEA basis; an indication that the allegation concerns employment; and the identities of the parties, either by name or by sufficient unique description. Correspondence which presents an apparent or potential Title VII, ADEA or EPA basis will be acknowledged and processed . . . . Arrange for a phone or in-person interview."

See id. at §2.2.

of insisting that every complainant who visits an EEOC office sign an affidavit on the spot, without any opportunity for a reasoned analysis of the complainant's problem by agency professionals. Complainants in the Fourth Circuit who cannot come in person to one of the EEOC offices would as a practical matter have a shorter period of time than others in which to contact the EEOC; a letter received by the EEOC in that circuit shortly before expiration of the statutory deadline would not allow the agency sufficient time to obtain from the complainant a second, sworn statement. The EEOC's Washington, D.C. office, which handles complaints from the Maryland and Virginia suburbs as well as from the District of Columbia, will have to use different procedures depending on whether the employee, if forced to litigate his or her claim, would bring suit in the District of Columbia or Fourth Circuit.

Second, in the ten states located in the First, Third and Eleventh Circuits, which have yet to address this issue, EEOC officials cannot know how to handle a charge submitted before the filing deadline but only verified thereafter. The decisions in the Third and Eighth Circuit hold that such charges should be dismissed as untimely, but under section 1601.12(b) and the Compliance Manual such charges are timely, and decisions in the Second, Fifth, Sixth and Seventh Circuits insist that the charges be treated as timely regardless of whether there is an EEOC regulation on the subject.

Third, in the seven circuits which have upheld or applied section 1601.12(b), the Fourth Circuit decision--even more than the earlier Eighth Circuit caselaw--raises serious uncertainty as to whether EEOC officials who treat unsworn charges as sufficient to meet the filing deadlines may be misleading complainants and inducing them to forfeit their rights. The Commission, whose regulation has been upheld in these circuits, cannot reasonably be expected now to disregard that regulation on the basis of a divided Fourth Circuit decision. Yet the possibility that this Court may at some point in the future side with the Fourth Circuit, or that one of these seven circuits may now decide to reconsider the matter en banc, makes continued adherence to the regulation perilous.

We believe that section 1601.12(b) is valid, and that certiorari should be granted to confirm the correctness of the

EEOC's long established practice. If, however, the Court were ultimately to conclude that the regulation is invalid, this should be addressed now, before countless additional discrimination victims have relied to their detriment on the regulation and related agency practice.

If section 1601.12(b) is to be struck down, equitable tolling should be applied to complainants, like petitioner, who relied upon that regulation to their detriment. In other contexts this Court has recognized that equitable tolling is appropriate where a claimant has "fil[ed] a defective pleading during the statutory period." *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96 (1990). As the EEOC observed in circumstances similar to the instant case, "a trained attorney looking into the charge filing requirement . . . would have discovered that EEOC regulations and procedures provided that" an unsworn charge was sufficient to preserve Title VII rights.[17] "It would be unfair to [petitioner] to bar [his] claim based on the failure to comply with any technical requirements that this Court might now identify above and beyond those recognized by EEOC."[18] Even the Commission itself understood prior to the instant decision that Fourth Circuit caselaw had accepted section 1601.12(b).[19]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

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[17] Brief of the EEOC as Amicus in support of Appellant, Shempert v. Harwick Chemical Corp., No. 97-1634 (8th Cir), 19 n.9.

[18] *Id.* at 17.

[19] *Id.* at 12-13 n.4; Brief of the EEOC as Amicus Curiae, Tinsley v. First Union National Bank, No. 97-2640, 11.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals,
Fourth Circuit.

Leonard EDELMAN,
Plaintiff-Appellant,

v.

LYNCHBURG COLLEGE,
Defendant-Appellee.

No. 99-2408

Argued: June 8, 2000
Decided: Oct. 2, 2000

Affirmed and remanded.

Luttig, Circuit Judge, filed concurring opinion.

Before WILKINS and LUTTIG, Circuit Judges, and BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BEEZER, Senior Circuit Judge:

Leonard Edelman appeals the district court's dismissal of his employment discrimination action for lack of subject matter jurisdiction. This case presents an issue of first impression in this circuit: whether 29 C.F.R. § 1601.12(b), a regulation promulgated by the Equal Employment Opportunity Commission ("EEOC"), conflicts with the statutory requirements of Title VII of the Civil Rights Act, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1), to the extent that the regulation permits a charge of discrimination to be verified after the expiration of the applicable limitations period. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that, so applied, the EEOC regulation is contrary to the plain language of the statute, we affirm the dismissal of

Edelman's action on the grounds that he failed to file a timely charge of discrimination.

I

Edelman, a white Polish-Jewish male biology professor, was denied tenure by Lynchburg College on June 6, 1997. On November 14, 1997, Edelman sent a letter to the EEOC alleging that he had been subject to "gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." According to Edelman, Jacqueline Asbury, the Dean of the College, opposed his tenure because she wanted to improve the percentage of tenured women on the faculty. Edelman claims that Asbury ignored the uniform support of his department chairman, an ad hoc faculty committee, and the Faculty Personnel Committee. At the conclusion of his letter, Edelman wrote, "I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case [.]" Edelman's letter was received by the EEOC on November 18, 1997.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC that stated:

> Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.
>
> * * *
>
> Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Shortly thereafter, the EEOC sent a letter to Edelman advising him that it needed additional information in order to investigate his case. The EEOC's letter urged Edelman to set up an interview "as soon as possible because a charge of

discrimination must be filed within the time limits imposed by law[.]"

On February 17, 1998, the EEOC sent Edelman an appointment notice advising him that his interview was scheduled for March 3, 1998. The interview was conducted as scheduled. On March 18, 1998, the EEOC mailed a draft charge to Edelman for his signature. Edelman's verified charge of discrimination was filed with the EEOC on April 15, 1998--313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge. Approximately one week later, the EEOC forwarded the charge to both Lynchburg College and the Virginia Council of Human Rights ("VCHR"), the state agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. Lynchburg College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§ 2000e through 2000e-17. Lynchburg College then moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Because the district court concluded that Edelman failed to timely file his charge of discrimination, it granted Lynchburg College's motion, dismissed the Title VII claim, and remanded Edelman's remaining claims to state court. Edelman timely appeals.

II

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Evans v. B.F. Perkins Co*, 166 F.3d 642, 647 (4th Cir.1999).

In order to assert a Title VII claim in federal court, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 239 (4th Cir.1999). Title VII establishes two potential limitations periods within which the discrimination charge must be filed with the EEOC. *See* 42

U.S.C. § 2000e-5(e)(1); *see also Tinsley v. First Union National Bank*, 155 F.3d 435, 439 (4th Cir.1998). The basic limitations period is 180 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). The limitations period is extended to 300 days, however, in "deferral states." *See id.* § 2000e-5(e)(1).

A "deferral state" is one which has a state law "prohibiting the unlawful employment practice alleged" and a state or local agency authorized "to grant or seek relief" from the practice. *See id.* 2000e-5(c). Virginia is a "deferral state." *See Tinsely*, 155 F.3d at 440. Accordingly, the 300-day limitations period applies to Edelman's Title VII claim.

III

Edelman argues that the district court erred in dismissing his Title VII claim because his April 15, 1998 charge of discrimination related back to his November 14, 1997 letter and was thus timely filed within 300 days of June 6, 1997, the date of the alleged discrimination. Title VII states that charges of discrimination "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The relevant EEOC regulation states that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Edelman's letter was mailed to the EEOC within 300 days and sufficiently identified the parties and the alleged discriminatory action. However, the letter was not sworn to under oath or affirmation. Nevertheless, Edelman relies on the second sentence of the regulation, which provides that "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ... will relate back to the date the charge was first received." *Id.*

The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

In order to answer this question, we must carefully consider the relationship between the regulation (Section 1601.12(b)) and the statute (Title VII, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1)). We begin with the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court considered the Chevron framework in the specific context of Title VII. The Court made clear the standard by which we are guided:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Id. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)).

Step one of the *Chevron* analysis, as confirmed by *Robinson*, requires us to determine whether Congress has expressed its intent with respect to the issue at hand. In undertaking this analysis, we are mindful that "agency power is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir.1998) (quoting *Ernst &*

Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976)) (internal quotation marks and other citations omitted).

The precise question at issue in this case is whether verification must occur within the statutory limitations period. "[T]he first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute." *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir.1995). As we have earlier stated, "[s]tatutory construction must begin with the language of the statute." *Id.*

We conclude that Congress has unambiguously spoken on this issue. As noted above, the language of the statute itself requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The plain meaning of this language compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge.

In defining a charge, Congress chose to limit the EEOC's authority. While Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly establishes the time period within which a charge must be filed. *See id.* § 2000e-5(e)(1).

Because a charge requires verification, *see id.* § 2000e-5(b), and because a charge must be filed within the limitations period, *see id.* § 2000e-5(e)(1), it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII.

Having concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. Step two of the *Chevron* analysis does not come into play, and we do not apply the EEOC regulation. *See*

Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Brown & Williamson*, 153 F.3d at 161 ("It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency.").

The Supreme Court has long adhered to the rule that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9. *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions."); *Webster v. Luther*, 163 U.S. 331, 342 (1896) ("But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute").

Likewise, this circuit has refused to defer to agency interpretations that are contrary to the statute at issue. *See, e.g., In re Apex Express Corp.*, 190 F.3d 624, 641 (4th Cir.1999) ("Here, there is no ambiguity in the text of the statute to justify the [agency's] position or a turn to legislative history."); *Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 988 (4th Cir.1996) ("We cannot endorse the Secretary's reading. To do so, we would have to violate both a clear canon of statutory construction, and the plain meaning of the two terms.").

In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter.

IV

Edelman argues that our decision today conflicts with our earlier discussions of the regulation in *Tinsely v. First Union National Bank*, 155 F.3d 435 (4th Cir.1998), and *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir.1994). We disagree.

In *Balazs*, the earlier of the two cases, we addressed the regulation in the context of a plaintiff's attempt to verify his allegations of discrimination almost four months after the EEOC issued plaintiff a right-to-sue letter and terminated its processing of his case. *See Balazs*, 32 F.3d at 157. The plaintiff made two arguments on appeal: first, that a charge of discrimination did not require verification; and, second, that an unverified charge may be cured by amendment. *See id.* at 156. We rejected outright the plaintiff's first argument, concluding, as we conclude today, that "a sworn charge of discrimination with the EEOC is a mandatory prerequisite to the validity of the charge." *Id.*.

With respect to the plaintiff's second argument in *Balazs*, although we noted that "[i]t has been held that this regulation is valid and is not contrary to the statute requiring verification of charges," *id.* at 157 (citing *Peterson v. City of Wichita*, 888 F.2d 1307, 1308-09 (10th Cir.1989)), we refused to apply the regulation under the facts of the case, *see id.* We expressed our concern that "[c]arried to its logical conclusion, under the EEOC's interpretation of its regulation it would never be too late to verify a charge[.]" *Id.* Thus, we determined that "a reasonable construction" of the regulation would "simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC's files [.]" *Id.* Here, we similarly conclude that a reasonable construction must be imposed on the regulation, one which does not allow relation-back of the verification requirement beyond the time limitation prescribed by Congress.

We briefly mentioned both the regulation and *Balazs* in a footnote in *Tinsley*:

> The district court also rejected Tinsley's claim that her untimely formal charge amended and related back to her timely-but-unsworn letter. In so ruling, the district court inexplicably ignored the applicable EEOC regulation, 29 C.F.R. § 1601.12(b), which explicitly allows such an amendment. What is more, the district court ignored the recent conclusion of this Circuit approving the very use of the regulation that Tinsley, joined by the EEOC, urges: allowing her verified claim to amend and relate back to the date her unverified claim was filed.

Tinsley, 155 F.3d at 439 n. 2 (citing *Balazs*). We noted, however, that in light of our conclusion that Tinsley's verified charge was filed within the applicable limitations period, which we held to be 300 days rather than 180, there was no need to address the regulation. *See id.* ("Because we hold that the appropriate statute of limitations period was 300 days, we need not resolve any of these other questions."). Thus, the most that can be said about our discussion of the regulation in Tinsley is that it is dictum. Moreover, contrary to Edelman's characterization, the facts of this case are materially different from those of Tinsley. Tinsley verified his allegations of discrimination within the statutory time period, whereas Edelman did not.

V

Although our decision today is consistent with our prior discussions of the regulation, we are mindful that our analysis conflicts with that of several other circuits.

In *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir.1991), the Seventh Circuit reversed a decision of the district court dismissing the plaintiff's Title VII action as untimely. *See id. at* 322. The *Philbin* court held that a timely filed Intake Questionnaire, which is verified after the

limitations period, may be sufficient to constitute a charge.* *See id. at* 323.

The court relied on two factors in reaching its decision. First, the court stated that "Title VII is remedial legislation which must be construed liberally." *Id.* Citing its previous decision in *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir.1968), in which it stated that the verification requirement was "directory and technical rather than mandatory and substantive," *Choate*, 402 F.2d at 359, the *Philbin* court concluded that "[i]n keeping with the broad purposes of the act, the omission of technical requirements which are later fulfilled should not affect the timeliness or validity of the charge." *Philbin*, 929 F.2d at 324.

In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII "is cast in mandatory terms." *Equal Employment Opportunity Comm'n v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir.1978). We also noted then, as we confirm now, that we "see no reason to ignore the plain language that Congress has enacted." *Id.*; *accord Hamel v. Prudential Ins. Co.*, 640 F.Supp. 103, 105 (D.Mass.1986) ("Although an Intake Questionnaire is signed, it is not signed under oath. Any suggestion that this distinction is formalistic tends to ignore the significance of a perjury conviction.").

The second factor relied upon by the *Philbin* court was "the deference accorded EEOC regulations." *Philbin*, 929 F.2d at 324. In applying the *Chevron* analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute. The court did note,

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* The court did not go so far as to say that a subsequently-verified Intake Questionnaire will always constitute a charge. *See Philbin*, 929 F.2d at 324. Instead, the court considered the EEOC's treatment of the questionnaire. Specifically, the court recognized that the EEOC had not only assigned a charge number to the questionnaire within the 300-day time period, but also notified Philbin's employer within the same period. *See id.* In Edelman's case, the EEOC neither assigned a charge number nor notified Lynchburg College of Edelman's claim within the 300-day limitations period.

however, that "[w]hile the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period." *Id.*

As discussed in Section III above, we read the plain language of the statute differently. Moreover, while we recognize the remedial nature of Title VII, we see no reason to distort Congress's mandate that charges be timely verified in order to make room for the EEOC's regulation. Cf. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 (1984) (holding that there is "no satisfactory basis for giving Title VII actions a special status under the [Federal] Rules of Civil Procedure").

Finally, we note that the Seventh Circuit is not the only other circuit to have addressed the conflict between the EEOC regulation and the statutory provisions of Title VII. Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1308 (10th Cir.1989) (rejecting the district court's conclusion that regulation was contrary to statute and thus beyond EEOC's power to promulgate); *Casavantes v. California State Univ.*, 732 F.2d 1441, 1442-43 (9th Cir.1984) (noting that its position is "consistent with the recent trend in Title VII jurisprudence which recognizes the importance of nontechnical interpretations of the procedural requirements inherent in the processing of discrimination claims"; condemning contrary position as "overly formalistic"); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir.1982) (reversing summary judgment in favor of employer because factual issues remained as to whether form completed by plaintiff constituted "charge" and as to whether EEOC waived verification requirement). But *see Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir.1998) (holding that Intake Questionnaire does not constitute a "charge" because it is not verified and that regulation only allows an amendment to relate back to the date a charge is first received).

We disagree with these decisions, in short, because we believe that they improperly substitute policy justifications for clear statutory language. *See* Kenneth Culp Davis & Richard

J. Pierce, Jr., *Administrative Law Treatise* §§ 3.2, 3.3 (3rd ed.1994) (discussing *Chevron*'s attempt to curtail judicial policy-making).

V

Although we conclude that Edelman failed to timely file a charge of discrimination, we recognize that this failure does not deprive the court of subject matter jurisdiction. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). But *see Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 137 (4th Cir.1995) (discussing Title VII's exhaustion requirement in jurisdictional terms).

Before we affirm the dismissal of Edelman's Title VII claim, we consider whether the facts of this case warrant equitable tolling of the limitations period. Edelman was represented by counsel at all stages of the administrative process. In fact, his initial letter to the EEOC referenced his attorneys by name. Despite the fact that Edelman attempts to attribute significant delay to the EEOC's processing of his complaint, he waited more than five months after the alleged discrimination before even contacting the agency. Moreover, the EEOC mailed the draft charge to him before the expiration of the limitations period. Had he promptly signed and returned the proposed draft, which included a form of oath or affirmation, his charge would have been timely filed.

We hold that Edelman is not entitled to equitable tolling of the limitations period. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.").

VII

We believe this case is best summed up in the words of the Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be

> disregarded by courts out of a vague sympathy for particular litigants.... [I]n the long run, experience teaches that strict adherence to the procedural requirements specified *512 by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Ctr., 466 U.S. at 152, 104 S.Ct. 1723.

The judgment of the district court dismissing Edelman's action is affirmed, but on remand the district court should take proper action to indicate that the dismissal is for failure to exhaust administrative remedies rather than for lack of subject matter jurisdiction.

AFFIRMED AND REMANDED.

LUTTIG, Circuit Judge, concurring:

I would decide this case on the narrow ground that Edelman's second filing is ineligible for relation back because (1) Edelman characterized his initial filing as a *request* for a charge rather than as a charge; (2) the EEOC did not even treat Edelman's original filing as a charge; (3) the EEOC never served a copy of the letter on Lynchburg College; and (4) the second sworn letter, which allegedly amended the first letter, even alleges different discriminatory conduct than that charged in the original letter.

I am sufficiently uncomfortable with the broader ground for decision set forth in the majority opinion, that verification may never relate back after 180 days from the date of the alleged discriminatory action, that I am unable to concur in the opinion for the court. As to this issue, we are not confronted with a single statute stating either by terms or in effect that "a verified charge must be filed within 180 days of a discriminatory action." Were we confronted with a single statute worded in this way, then the plain meaning interpretation advanced in the opinion for the court would, I think, be unassailable. Instead, we are presented with two statutes, the first providing that a charge shall be filed within 180 days of the unlawful employment practice, and the second providing that charges shall be in writing and include an oath or affirmation.

Although I confess some uncertainty as to this, it seems to me that, between these two statutes, there is not *necessarily* the nexus required in order to sustain the plain meaning interpretation advanced in the opinion. That is to say, it seems to me *at least plausible* to read the first statute to require simply that a charge be filed within 180 days, and the second as freestanding of the first, and simply to require that, before a charge is finalized, all of the allegations and information required by the EEOC be provided and verified. Of course, if the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the 180 days, and relation back would be available by regulation.

Apart from what I believe is its inherent structural logic, this interpretation is plausible because there is no statutory

definition of "charge," contrary to the implicit premise of the majority's opinion. There is no statutory definition that provides that, in order to constitute a "charge," an allegation must be verified. Thus, the "charge" that must be filed within 180 days need not--at least need not by definition--be an allegation that is verified or that includes all the information that eventually must be provided before it is sufficiently complete to require notice to the employer. Insofar as the statute informs us, the "charge" that must be filed within 180 days can be merely an allegation of discrimination; it need not be verified.

As precisely as I can state it--and I readily concede that the point is conceptually elusive--the majority's interpretation seems to me actually to depend entirely upon reading the two statutes as if they were one. And I fear that it is *only* through reading the two as one that the nexus necessary to the majority's interpretation is supplied; in other words, unless the two statutes are read as one, I believe that it is impossible to say, with the certainty necessary to abrogate the agency's contrary interpretation, that a charge must be filed *and* verified within 180 days of the alleged discriminatory action.

I do not believe that the alternative interpretation I suggest is the only interpretation of the two statutes, by any means. Indeed, I do not even believe that it is the better interpretation; in fact, I believe that the one adopted by the majority is the better. But I do believe that this alternative interpretation of the agency is a plausible one. And, of course, being such, we are bound to give deference to that administrative interpretation.

For these reasons, I concur only in the judgment of the court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

ORDER

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Defendant Lynchburg College, having removed the action to this Court, filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth in the attached Memorandum Opinion, Defendant's motion to dismiss the Title VII claims is GRANTED. Because this Court lacks jurisdiction over the remaining claims, they are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order and the attached Memorandum Opinion to all parties and counsel of record.

ENTERED: [Norman K. Moon]
United States District Judge

9-20-99
Date

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Lynchburg College removed the action to this Court and filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Because Dr. Edelman failed to timely file his claim with the Equal Employment Opportunity Commission, Lynchburg College's motion to dismiss the Title VII claims is GRANTED. The remaining state law claims are REMANDED to the Circuit Court for the City of Lynchburg, Virginia.

I. BACKGROUND

Dr. Leonard Edelman, a Jewish white male, was hired by Lynchburg College (hereinafter "the College") as an Assistant Professor in 1993. Dr. Edelman entered into Lynchburg College's formal tenure evaluation process in the fall of 1996. He received tenure recommendations from the Chairman of the Biology Department and an ad hoc committee of the faculty. However, Dean Jacqueline W. Asbury recommended to President Charles Warren that tenure be denied. On May 23, 1997, President Warren informed Dr. Edelman by letter that the College's Board of Trustees had accepted his subsequent recommendation not to award Dr. Edelman tenure.

On November 14, 1997, Dr. Edelman sent a letter to the Equal Employment Opportunity Commission (hereinafter "EEOC") "request[ing] to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning [him] during January-June, 1997 culminating in the denial of [his] continued employment at the college." In this letter, which was not made under oath or affirmation, Dr. Edelman stated his belief that this case was "one of gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." The November 14 letter was followed by a letter from Dr. Edelman's counsel on November 26, 1997, which stated that "Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Counsel concluded the November 26 letter by stating that it was his "understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997." On December 3, 1997, Rosalind Hall-Smith, the EEOC Supervisor of the Charge Receipt/Technical Informational Unit, responded to the November letters by statuting that more information was needed before the matter could be pursued any further. Hall-Smith's letter concluded by stating that the EEOC would assume that Dr. Edelman did not intend to file a charge of discrimination with them if the EEOC did not hear from him within 30 days of the December 3 letter.

The EEOC conducted an interview with Dr. Edelman on March 3, 1998. On March 18, 1998, the EEOC sent Dr.

Edelman a Charge of Discrimination form which it had prepared after the March 3 interview. Dr. Edelman signed the Charge of Discrimination form and declared, under the penalty of perjury, that he believed that he was "denied tenure and terminated because of [his] sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." Dr. Edelman did not check the box on the Charge of Discrimination form beside the statement: "I want this charge filed with both the EEOC and the state or local Agency, if any." The Charge of Discrimination form stated that the earliest and latest date of discrimination was June 6, 1997. Upon the filing of the Charge of Discrimination on April 15, 1998, the EEOC designated Dr. Edelman's claims as Charge Number 122980526.

II. DISCUSSION

A *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

A plaintiff has the burden of proving the existence of subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir. 1999). Lynchburg College now seeks a dismissal for lack of subject matter jurisdiction due to Dr. Edelman's alleged failure to timely pursue EEOC proceedings and state enforcement proceedings under state law with the Virginia Council on Human Rights (hereinafter "VCHR"), which is charged with administering the provisions of the Virginia Human Rights Act (hereinafter "VHRA"). Va. Code § 2.1-714 *et seq.* The pertinent provision of Title VII states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . **no charge may be filed** . . . by the person aggrieved **before the expiration of sixty days after proceedings have been commenced under the State or local law**, unless such proceedings have been earlier terminated. . . If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and

> signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

41 U.S.C. § 2000e-5(c)(emphasis added). Thus, a plaintiff is required to exhaust administrative and state remedies prior to filing an action in federal court. Typically, a plaintiff litigating a claim under Title VII has 180 days from the time of the aggrieved action in which to file a complaint with the EEOC. 42 U.S.C. § 2000e-5(e). Once the EEOC issues a right-to-sue letter, the plaintiff may then file suit in federal court. If, however, the plaintiff resides in a "deferral state" within the meaning of 42 U.S.C. § 2000e-5(c), the plaintiff will have 300 days in which to commence proceedings under the appropriate state or local law. *See Davis v. North Carolina Dep't of Correction*, 48 F. 3d 134, 137-40 (4th Cir. 1995)(stating that § 2000e-5 requires plaintiff to commence proceedings under state law before the EEOC can act upon federal discrimination claims). A "deferral state" is one which has a state or local law "prohibiting the unlawful employment practice alleged" and a state agency authorized "to grant or seek relief" from the practice. *Id.*; *EEOC v. Hansa Products, Inc.*, 44 F. 2d 191, 192 n. 1 (4th Cir 1988).

Virginia is such a "deferral state" and the VCHR is a "deferral" agency within the meaning of the statute with primary responsibility for enforcement of Title VII. *Capps v. City of Lynchburg*, Civil Action No. 6:99CV0048 (W.D.Va., Lynchburg Div., 08/12/99); *Tinsley v. First Union National Bank*, 155 F. 3d 435 (4th Cir. 1998). Thus, for this Court to have subject matter jurisdiction over Dr. Edelman's complaint, he must have filed a discrimination claim with the EEOC and the VCHR. The EEOC Charge of Discrimination, which was sworn and signed by Dr. Edelman, stated that the last date on which he was discriminated against was June 6, 1997. Thus, the last date for filing, by Dr. Edelman's own calculations beginning with June 6, 1997 as the latest date of discrimination, would be April 2, 1998. Because this Charge of Discrimination was not filed with any agency until April 15, 1998, Dr.

Edelman failed to file within the 300 days allowed in which to commence proceedings.

Dr. Edelman argues that he did timely file his complaint because the November 1997 letters were written and sent within the 300 day time limit. He further argues that the April 15, 1998 Charge of Discrimination relates back to the November 14, 1997 letter and that his filing date should, therefore, be considered as November 14, 1997. While the Code of Federal Regulations provides that "[a] charge may be amended to cure technical defects or omissions . . . ", the problem with the plaintiff's argument is that the November 14, 1997 letter did not constitute a charge to which the April 15, 1998 charge could relate.

Title VII requires charges to be made "under oath or affirmation." 42 U.S.C. § 2000e-5(b). Dr. Edelman's November 14, 1997 letter was not made under oath or affirmation. Title VII requires charges to contain "such information and be in such form as the Commission requires." *Id.* The EEOC responded to the November letters from Dr. Edelman and his attorney by stating that the information provided was not sufficient for the EEOC to continue investigating Dr. Edelman's claim. Title VII states that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days." *Id.* The EEOC did not serve notice of any discrimination charge on Lynchburg College within ten days of the November letters. In fact, Dr. Edelman's counsel specifically stated in his November 26, 1997 letter that Dr. Edelman wanted an interview with an EEOC investigator before any final charging documents were forwarded to Lynchburg College. The Court further observes that no charge number was assigned to the November 14, 1997 letter, that it was not sent as a charge of discrimination to the VCHR, and that the April 15, 1998 Charge of Discrimination does not even reference it. Thus, the Court agrees with the defendant's assertion that neither Dr. Edelman nor the EEOC proceeded as if the November 1997 letter did, or were intended to,

commence proceedings.[1] Accordingly, the November 14, 1997 letter did not commence proceeding. As a result, there is no charge for the April 15, 1998 charge to relate back. Thus, the filing date is April 15, 1998, which is beyond the 300 days allowed to timely commence proceedings.

Dr. Edelman claims that even if he did not timely commence proceedings, he is entitled to equitable tolling of the filing period. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 2d 234 (1982), the United States Supreme Court held that "filing a charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Dr. Edelman, however, fails to establish that there are any reasonable grounds in this situation to warrant an equitable tolling of the filing requirements.

Although Dr. Edelman argues that he is entitled to equitable tolling because of the EEOC's delay in responding to his letter, the EEOC interviewed him and then mailed the prepared Charge of Discrimination form to him on March 18, 1998, within the time allowed to commence preceding. The letter attached to the prepared Charge of Discrimination form invited Dr. Edelman to make any necessary corrections. All that Dr. Edelman had to do at that point was to review the form, sign it, check the box that would have simultaneously filed the charge with the VCHR, and mail the charge back to the EEOC in the enclosed postage paid envelope. Because Dr. Edelman has not shown that there was an unreasonable delay on the part of the EEOC from the time that he initially contacted them six months after the last date of discrimination to the time that he received the Charge of Discrimination in the mail, this Court does not conclude that the period of time that lapsed before receiving the prepared Charge of Discrimination warrants an equitable tolling of the time requirements.

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[1] This Court does observe that Dr. Edelman's counsel stated in his November 26, 1997 letter that he assumed that the filing date would be considered as of November 14, 1997. This Court, however, is aware of no authority that would allow a declaration of a party (or a party's counsel) of what should be considered a fling date to circumvent the requirements of Title VII. A filing date is established when proceedings are commenced as contemplated by the provisions of Title VII.

Similarly, the Court also disagrees with Dr,[sic] Edelman's argument that equitable tolling should be granted because Lynchburg College was not unduly prejudiced by his failure to commence proceedings in a timely manner. This argument fails to observe the fact that "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726 (1984). Dr. Edelman's situation is not one where the delays of anyone besides himself hindered his ability to timely commence proceedings. The EEOC did not lead him to believe that he had done everything required to commence proceedings. Following the November 1997 letters, the EEOC advised Dr. Edelman that the November 1997 letters were not sufficient and that additional information was needed before the matter could be pursued. Similarly, Dr. Edelman's situation is not one where Lynchburg College engaged in any type of misconduct that would have lulled him into inaction. Thus, there is no independent factor that would warrant equitable tolling. This Court may not grant equitable tolling just because there has not been a showing that Lynchburg College would be prejudiced by extending the time in which Dr. Edelman could have commenced proceedings. As stated by the United States Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Id.

The defendant's motion to dismiss the Title VII claim for lack of subject matter jurisdiction is GRANTED.

B. *Defendant's Motion to Dismiss Other Pending Motions*

Finally, in response to the defendant's 12(b)(6) motion to dismiss the state law claims for failure to state a claim upon which relief can be granted, these claims are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order to all parties and counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-20-99
Date

Supreme Court, U.S.
FILED
FEB 20 2001
OFFICE OF THE CLERK

No. 00-1072

In The

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether, under the circumstances of this case, EEOC regulation 29 C.F.R. §1601.12(b) permits petitioner to convert a timely letter requesting to file a discrimination complaint into a properly sworn charge after the statutory limitations period has expired.

II. Whether equitable tolling is appropriate in the circumstances of this case.[1]

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[1] The respondent has restated the first question in order to clarify that the Fourth Circuit did not declare 29 C.F.R. §1601.12(b) invalid, as suggested by the petitioner. The court ruled that the regulation could not be applied so as to add verification to a charge after the statutory limitations period had expired, thus producing a timely, sworn charge (Petition at 7a). The respondent has restated the second question because, as originally stated, it implied that the petitioner relied on the regulation in failing to file a sworn charge in a timely manner. There is no such indication in the record (see discussion *infra*).

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Respondent Lynchburg College respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Petitioner Leonard Edelman, seeking review of the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Supreme Court Rules 15 and 24 permit the respondent to omit certain sections of its brief that would otherwise be required, so long as the respondent is satisfied with the opposing party's presentation of the material in those sections. The respondent has no objection to the petitioner's presentation of the list of parties, citations to the opinions below, basis for jurisdiction, or recitation of the statutes and regulations, and does not repeat those here. However, the respondent objects to the questions presented and the statement of the case as put forth by the petitioner, and therefore restates those sections in its response.

STATEMENT OF THE CASE

This case involves an EEOC regulation that purportedly permits a complainant to convert a timely filed but unsworn letter requesting to file a charge into a properly sworn charge of discrimination after the limitations period has run. Even if this procedure is authorized by Title VII, as petitioner Edelman argues, the regulation is inapposite in this case, where neither Edelman nor the EEOC treated Edelman's unsworn letter as a charge of discrimination. The facts pertaining to petitioner's claims and his EEOC filings are further set forth below.

Lynchburg College ("the College") hired Leonard Edelman as an Assistant Professor of Biology in August 1993. Three years later, in the fall of 1996, Edelman filed an application for tenure— the award of a lifetime employment contract at the College. As required by College procedures,

his application was considered independently by his teaching colleagues, the College administration, and ultimately the College's Board of Trustees. While supported by his faculty colleagues, his application was not supported by the administration and was rejected by the Board of Trustees on May 23, 1997. Although this decision was sent to Edelman by campus mail on the same day it was made, Edelman claims that he did not receive notice of the tenure decision until June 6, 1997. Accordingly, the 300-day statutory limitations period for filing EEOC charges has been determined based on that later date.

As a preliminary step in making a complaint of discrimination, Edelman sent a letter to the EEOC on November 14, 1997, in which he claimed discrimination on the basis of gender, "exacerbated by discrimination on the basis of my family's national origin and religion." By its own terms, the unsworn letter was "a request to file a charge of employment discrimination." Edelman concluded his letter by stating that the EEOC would shortly be hearing from his two attorneys concerning his complaint.

The EEOC did not assign a charge number to Edelman's letter or send a copy of it to Lynchburg College. In fact, Edelman's own attorney asked the EEOC not to send Edelman's "charging documents" to the College until Edelman had an interview with an EEOC investigator. The EEOC complied with Edelman's request, and did not send the letter to the College.[2]

The EEOC responded to Edelman's letter on December 3, 1997. In that response, the EEOC stated that it

[2] Indeed, the EEOC never sent Edelman's letter to the College during the course of processing Edelman's complaint. The letter was made available to the College, along with the remainder of Edelman's EEOC file, only after the EEOC had closed its file on the case.

needed additional information in order to investigate Edelman's case. The EEOC further admonished Edelman that if he did not contact the EEOC to schedule an interview, the agency would assume that he "did not intend to file a charge of discrimination." The EEOC urged Edelman to schedule his interview as soon as possible, "because a charge of discrimination must be filed within the time limits imposed by law."

The EEOC interviewed Edelman by telephone on March 3, 1998. He decided not to pursue his claims of discrimination based on religion and national origin.[3] On March 18, 1998, the EEOC sent Edelman a formal charge form ("EEOC Form 5") containing a charge based on the information provided by Edelman during his interview as well as a section for a verified signature. The charge alleged gender discrimination only and did not in any way refer to Edelman's earlier letter or to its different allegations of religious and national origin discrimination. Although the EEOC had sent the Form 5 charge to Edelman with over two weeks remaining before expiration of the 300-day statutory period, Edelman did not file the verified charge with the EEOC until April 15, 1998, 313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge on EEOC Form 5. Approximately one week later, the EEOC sent a copy of the charge to both Lynchburg College and the Virginia Council on Human Rights, the Virginia agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right to sue letter on March 26, 1999.

[3] The intake notes from Edelman's interview with the EEOC on March 3, 1998, state "religious and national origin discrimination discounted. Do not include as a basis" (JA 115).

Edelman initially chose to pursue his grievance against the College in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. The College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§2000e through 2000e-17. In the amended complaint, he sought to resurrect his claims of discrimination on the basis of national origin and religion, even though those claims were nowhere mentioned in his verified charge before the EEOC. The College moved to dismiss, and the district court granted the motion on the basis that Edelman had failed to timely file his charge of discrimination. The district court's ruling was affirmed by the Fourth Circuit Court of Appeals, and Edelman filed a petition for certiorari.

REASONS FOR DENYING THE WRIT

I. This Case Is Not Appropriate For Certiorari Because Its Disposition Does Not Depend On The Validity Of 29 C.F.R. §1601.12(b).

In asking the Court to grant certiorari, the petitioner argues that the split among the circuits on the issue of verifying a charge after the limitations period has expired justifies a grant of certiorari in this case. The respondent disagrees on several grounds.

A. There Is No Need To Reach The Issue Of The EEOC Regulation's Validity In This Case.

On the facts in Edelman's case, the Fourth Circuit did not have to reach the issue whether 29 C.F.R. §1601.12(b) can properly be used to verify a charge after the limitations period for filing has expired. The Court had the option, taken by both the district court and Judge Luttig in his

concurring opinion in the Fourth Circuit, of ruling on a narrower ground—namely, that Edelman's unsworn letter did not constitute a "charge" that could be amended under the regulation.

As explained above, 1) Edelman characterized his letter as a "request to file a charge"; 2) the EEOC did not treat the letter as a charge, either when it was filed or subsequently; 3) the EEOC did not serve a copy of the letter on Lynchburg College or send a copy of it to the state deferral agency; 4) the sworn charge did not refer to the earlier letter; and 5) the charge alleged different discriminatory conduct than did the unsworn letter. These factors provided ample grounds for a ruling that the validity *vel non* of 29 C.F.R. §1601.12(b) need not and should not be reached, since in this case there was no "charge" to amend. While the Fourth Circuit majority reached out unnecessarily to consider the "relation-back" provision of the regulation as it applies to the requirement of verification, that is not a reason for this Court to do the same.[4]

B. The "Split" In Circuits On The Validity Of The EEOC's Regulation Does Not Compel A Grant Of Certiorari In This Case.

The "split" in circuits on the validity of the relation-back regulation and its effect on EEOC claimants is not

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[4] In the Fourth Circuit's majority opinion, Judge Beezer stated that "[t]he parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties, disagree, however, as to whether the regulation may be so applied" (Petition at 4a). The respondent wishes to clarify that it has never agreed that Edelman's unsworn letter constituted a "charge" to which the regulation could be applied. The respondent argued its case on the grounds adopted by the district court, and mentioned a challenge to the validity of the regulation only as a secondary, and unnecessary, ground of decision.

nearly so pronounced as the petitioner implies. In fact, the clear-cut facts of this case would have produced the same outcome in the two circuits that have most recently approved the use of 29 C.F.R. §1601.12(b) to verify a charge after the limitations period had expired.

In the Seventh and Tenth Circuits, the validity of the regulation has been upheld, but those courts do not apply the regulation automatically. Instead, they evaluate the facts of the case to determine how the unverified complaint was treated by the EEOC and also to determine whether the employer was prejudiced by the belated verification. For example, in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir. 1991), the court held that on the facts of that case, the EEOC's intake questionnaire qualified as a charge and could therefore be verified after the statutory period had run. In so holding, the court considered whether the EEOC had treated the questionnaire as a charge. The court noted that the EEOC had assigned a charge number to the questionnaire and had also notified the claimant's employer of the charge within the 300-day limitations period. In other words, the EEOC treated the questionnaire as a charge, and complied with the statutory requirement to send a copy of a charge to the employer. In contrast, the EEOC's handling of Edelman's unsworn letter indicates that it did not regard the letter as a charge. In fact, the EEOC's refusal to send the College a copy of the letter—and Edelman's request that the agency refrain from doing so—indicates that neither of them regarded the letter as a charge. Further, Edelman's sworn charge did not relate back to the letter because it alleged different discriminatory conduct. On these facts, even the Seventh Circuit would refuse to allow belated compliance with the verification requirement (*see* Petition at 10a).

Similarly, in *Peterson v. City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), *cert. den.* 494 U.S. 932, 109 L.Ed.2d 502 (1990), the EEOC had assigned a charge number to the unverified complaint. The court upheld use of the regulation "when, as here, the defendant has alleged no prejudice arising from its operation." That requirement is not met here, because the College was prejudiced by application of the regulation. It was not furnished with a copy of Edelman's letter, which was supposedly "amended" by his sworn charge, until the administrative process was complete, and therefore had no opportunity to respond to the charges of discrimination based on religion and national origin while the case was still pending before the EEOC. Nor did it have the benefit of Edelman's detailed explanation of his gender claim until the administrative process was finished. In the Tenth Circuit, this prejudice would prevent application of the EEOC regulation as sought by the petitioner here.[5]

The petitioner also asserts that the Second, Ninth, and District of Columbia Circuits, while they have not ruled directly on application of the regulation in the context at

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[5] The Fifth and Sixth Circuit cases relied on by the petitioner predate the 1972 amendments to Title VII. *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F.2d 462 (5th Cir 1969); *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355 (6th Cir. 1969). The 1972 amendments transformed the requirement of verification from "prefatory language" (i.e. "[w]henever it is charged in writing under oath by a person claiming to be aggrieved…the Commission shall…") into "a clearly stated statutory prerequisite" (i.e., "charges shall be under oath or affirmation"). *See Vason v. City of Montgomery*, 2001 WL 69245 (11th Cir. 2001) (discussing significance of 1972 amendment to Title VII). Given the "prefatory" nature of the earlier language, it is not surprising that, as the petitioner puts it, "[i]n the years immediately following the enactment of Title VII, the statute itself was universally interpreted" to allow post-limitations verification (Petition at 8). The petitioner fails to mention that this "universal" interpretation was of a different version of the statute.

issue here, have applied it or cited it with approval.[6] However, the decisions in those circuits, like those in the Seventh and the Tenth, merely reinforce the respondent's position that this case is not an appropriate vehicle for resolving the "split" in the circuits.[7] In both *Casavantes v. California State University*, 732 F.2d 1441 (9th Cir. 1987) and *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2nd Cir. 1981), the court took equitable considerations into account, and—unlike this case—those considerations weighed in favor of the claimant. In *Casavantes*, the claimant was acting *pro se*, and the EEOC did not send him the charge until the 300-day limitations period had already elapsed. In *EEOC v. Sears, Roebuck*, the central issue was whether a "de facto" commissioner had authority to verify a charge on behalf of the EEOC. He had done so twelve days after the statutory deadline, and the court noted that there had been no prejudice to the employer. Even accepting the petitioner's contention that these two circuits are favorably disposed to allowing belated verification to "relate back," Edelman would not qualify for this treatment.

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[6] Perhaps in an effort to suggest greater consensus in the circuits than actually exists, the petitioner also asserts that the Eleventh Circuit, unlike the Fourth, has held that an intake questionnaire can qualify as a charge, "if it satisfie[s] the requirements of 29 C.F.R. §1601.12(b)" (Petition at 7, n.7). The petitioner cites *Clark v. Coates and Clark, Inc.*, 865 F.2d 1237 (11th Cir. 1989) in support of this statement. In that case, the court held that an intake questionnaire, filed timely, constituted a charge even though the "formal charge" was not executed until after the statutory deadline. However, Clark involved not a Title VII claim but a claim under the Age Discrimination in Employment Act (ADEA), which does not require that charges be sworn. The regulation at issue here was not even mentioned in the case, and would have been irrelevant in any event.

[7] The case cited by the petitioner from the D.C. Circuit, *Simpkins v. Washington Metropolitan Transit Authority*, 1991 WL 702349 (D.C.Cir. 1997), is an unreported case where the regulation is mentioned only in dicta. The court remanded the case for development of facts related to equitable tolling.

In all circuits, courts have been authorized by this Court to take equitable considerations into account in determining the issue of timely filing under Title VII. In *Zipes v. Trans World Airlines, Inc*, 455 U.S. 385 (1982), this Court held that filing a charge of discrimination with the EEOC is not jurisdictional, but instead is a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. These doctrines are employed by the Fourth and the Eighth, as well as the other circuits, to allow claims to proceed where the statutory requirements for charges have not been strictly adhered to, but equitable considerations weigh in favor of allowing the claims to proceed. *See, e.g., Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998) (court applied doctrine of equitable tolling where EEOC did not send charge to claimant until several months after the statutory limitations period had run; EEOC also assigned charge number to unverified complaint and notified the employer of the complaint); *Waiters v. Robert Bosch Corp.*, 683 F.2d 89, 92 (4th Cir. 1982) (equitable tolling applied where EEOC error rendered filing untimely); *Lane v. Wal-Mart Stores East*, 69 F.Supp. 2d 749, 754-755 (D.Md. 1999) (pre-*Edelman* court allowed "relation back" under regulation, but also held equitable tolling appropriate where EEOC employee provided incorrect information to *pro se* complainant).

Because equitable tolling and other equitable doctrines are universally available in cases addressing the issue of timely filing, and because courts factor in equitable considerations even when applying the regulation at issue here, the "split" in the circuits does not produce such widely differing results from circuit to circuit as the petitioner implies. Accordingly, no compelling conflict exists in the circuits that requires the immediate intervention of this Court. While the Court may decide in the future to consider whether 29 C.F.R. §1601.12(b) can validly be applied in the

context of post-limitations verification, this case is not the appropriate vehicle for consideration of this issue.[8]

II. Certiorari Is Not Appropriate In Order To Salvage The EEOC's "Longstanding Legal Scheme" Of Processing Complaints.

The petitioner argues that this Court should grant certiorari because the Fourth Circuit's decision "undermines" the EEOC's "longstanding legal scheme" for processing complaints of discrimination (Petition at 10-11). However, the elements of this scheme that the petitioner describes as threatened by the Fourth Circuit's decision have nothing to do with this case. For example, the petitioner is concerned that the EEOC's unsworn intake questionnaires "would probably have to be abandoned." But no intake questionnaire was used in this case (*Id.*. at 10). The petitioner further warns that complainants would be forced into signing affidavits hurriedly, "without any opportunity for a reasoned analysis of the complainant's problem by agency professionals" (*Id.* at 11). Here, Edelman had the benefit not only of "reasoned analysis" of his claims by the EEOC, but also by his two sets of attorneys, well before the deadline for filing. Indeed, none of the "parade of horribles" recited in this portion of the petition has any relevance to Edelman's situation whatsoever.

The petitioner also suggests that EEOC officials may feel obligated to handle complaints differently depending on where they arose (Petition at 11). While this may be true, it was true before the Fourth Circuit's decision as well. Again, should the Court wish to address the issue of verifying a

[8] The Court denied certiorari in *Shempert v. Harwick Chemical Corp.*, 151 F.3d 793 (8th Cir. 1998), *cert. den.* 525 U.S. 1139 (1999), as well as in *Peterson v. City of Wichita*, 888 F.2d 1307 (10th Cir. 1989), *cert. den.* 495 U.S. 932 (1990).

charge after the expiration of the statutory limitations period, it should do so in a case where that issue was determinative of the outcome of the case, rather than in this case, where the issue did not have to be reached.

III. Certiorari Is Not Appropriate To Address Equitable Tolling.

The petitioner also asks the Court to grant certiorari in order to rule that all "complainants, *like petitioner*, who relied upon that regulation to their detriment," are entitled to equitable tolling (emphasis added). The record in this case contains no suggestion that the petitioner relied on this regulation, or any other regulation or representation by the EEOC, when he filed late. Indeed, the record indicates that he did not so rely.[9] Nor, as held by both the district and appeals courts, does his case qualify for equitable tolling on any other basis.

This Court does not grant certiorari for the purpose of rendering advisory opinions. Yet this is what the petitioner would have the Court do on the issue of equitable tolling. The Court should decline this invitation.

[9] Edelman has never claimed ignorance of the applicable statutory deadline—perhaps because such a claim would be impossible to credit, given that he was represented by two attorneys at the time he first contacted the EEOC. Simple negligence is the most likely explanation. While Edelman's attorneys may have miscalculated, that does not create an issue for this Court.

CONCLUSION

For all of the above reasons, the respondent asks that the petition for certiorari be denied.

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IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

(1) Since the petition for certiorari was filed in this case, three additional decisions have recognized the existence of the inter-circuit conflict regarding the validity of section 1601.12(b). *Jordan v. Bates USA*, 2001 WL 138409 (2d Cir. Feb. 16, 2001);[1] *Vason v. City of Montgomery, Alabama*, 2001 WL 69245 (11th Cir. Jan. 29, 2001);[2] *Preus v. Dominick's Finer Foods*, 2001 WL 58945 (N.D. Ill. Jan. 17, 2001).[3]

(2) Respondent's principal response to the petition is to criticize the court of appeals for having decided the question presented at all. The Fourth Circuit, respondent objects, "reached out unnecessarily" to pass on validity of section 1601.12(b)(Br. Opp. 5); "the issue did not have to be reached." (Br. Opp. 11). Respondent acknowledges that in the court below it presented "a challenge to the validity of the regulation" (Br. Opp. 5 n. 4), but seemingly disavows responsibility for the Fourth Circuit's decision to sustain that challenge.

A respondent's regret that a court of appeals decided a certworthy issue is not an appropriate basis for denial of review by this Court. Respondents would always prefer that favorable court of appeals decisions rest on grounds that would not warrant a grant of certiorari.

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[1] 2001 WL at *2 n. 3 (noting "a seeming Circuit split concerning whether or not the position taken by the regulation is sustainable. Compare *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F. 2d 321, 323 (7th Cir. 1991) . . . with *Edelman v. Lynchburg College*, 228 F. 3d 503, 508 (4th Cir. 2000)," and that the decision in *Philbin* was consistent with the Second Circuit decision in *EEOC v. Sears, Roebuck and Co.*, 650 F. 2d 14 (2d Cir. 1981)).

[2] 2001 WL at *2 n. 3 (contrasting *Edelman v. Lynchburg College*, "holding that 29 C.F.R. § 1601.12(b) . . . is invalid because it thwarts the plain language of Title VII" with *Philbin v. General Electric Capital Auto Lease, Inc.*, "upholding same regulation as not unreasonable and within EEOC's power to promulgate.")

[3] 2001 WL 58945 at *1 n. 1 ("the situation in *Philbin*, where the initial intake questionnaire was not verified, has led some other courts (most recently *Edelman v. Lynchburg College*, 228 F. 3d 503, 510-11 (4th Cir. 2000) to differ with its direct holding.")

The Brief in Opposition advances an alternative ground for affirmance, arguing that petitioner's letter to the EEOC "did not constitute a 'charge.'" (Br. Opp. 5)[4]. As respondent acknowledges, however, the court of appeals majority did not reach this issue. The existence of such unresolved contentions is not uncommon and does not militate against a grant of certiorari. The decision below is final, not interlocutory, and the holding regarding the validity of section 1601.12(b) is the sole basis of the majority opinion, not dicta. If review is granted and this Court upholds the validity of section 1601.12(b), respondent would remain free on remand to pursue any alternative arguments. *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32, 41 (1999); *West v. Gibson*, 527 U.S. 212, 223 (1999); *Roberts v. Galen of Virginia*, 525 U.S. 249, 253 (1999).

The Fourth Circuit emphatically struck down section 1601.12(b) in language similar to that used by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 69 U.S.L.W. 4048 (2001). *Compare* Pet. App. 6a ("the regulation . . . thwarts the plain language of Title VII) *with Solid Waste Agency*, 69 U.S.L.W. at 4050 ("the text of the statute will not allow" the Migratory Bird Rule); *compare* Pet. App. 11a ("we see no reason to distort Congress's mandate . . . to make room for the EEOC's regulation") *with Solid Waste Agency*, 69 U.S.L.W. at 4052 (the Migratory Bird Rule "exceeds the authority granted to respondents under . . . the CWA.") Respondent appears to contend that such a decision does not declare a regulation invalid, but holds only that the regulation cannot "validly be applied." (Br. Opp. i n. 1, 9). A decision that a regulation cannot validly be applied[5] is a decision that the regulation is invalid. Where a regulation and

[4] This argument is not a strong one. The document which respondent insists petitioner did not intend as a charge concludes with the words "I hereby file a charge of employment discrimination . . . and I call upon the EEOC to investigate this case." (Pet. App. 2a). The responsible EEOC officials submitted affidavits confirming that they regarded the November 14, 1997 letter as a legally sufficient charge. (J.App. 80-81, 90-91).

[5] The Fourth Circuit held that section 1601.12(b) is inconsistent with Title VII *because* it "permits a charge to be verified after the expiration of the limitations period." (Pet. App. 6a). Under the decision below the regulation is facially invalid, and could not be applied in any circumstances.

the underlying statute are alleged to be in conflict, "the court must determine which of these conflicting rules governs the case. This is the very essence of the judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803).

(3) Respondent seeks to minimize the conflict regarding section 1601.12(b) by suggesting that the decisions in the Second, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits did not actually rest on that regulation, but instead "considered," "noted" or "took . . . into account" "equitable factors" present in each case. (Br. Opp. 6-9). That simply is not an accurate description of the cases in question.

Respondent suggests that the Seventh Circuit decision in *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321 (7th Cir. 1991) was based, not on section 1601.12(b), but "on the facts of that case," specifically EEOC's decision to treat the plaintiff's unsworn allegations as a charge. (Opp. R. 6). That is not correct. The Seventh Circuit's analysis of the verification issue relied directly on the regulation.

> [T]he central issue in this case is whether the timely Intake Questionnaire in conjunction with the subsequently filed charge satisfied the statutory time bar for Title VII claims. . . . The debate centers around the difference between 42 U.S.C. § 2000e-5(b) and a regulation promulgated pursuant to that statute, 29 C.F.R. § 1601.12(b). . . . In § 1601.12(b) . . . the EEOC then stated that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge . . . . Such amendments will relate back to the date the charge was first filed." 29 C.F.R. § 1601.12(b). The district court decisions . . . have held that the EEOC is exceeding the authority of the statute . . . . The circuit courts of appeals that have addressed the issue hold that the EEOC has the power to decide that a subsequent verification of a written statement relates back to the date of the initial filing and satisfied the statutory requirement. . . . . We find the reasoning of the circuit courts of appeals persuasive . . . .

929 F. 2d at 322-23 (footnote omitted).[6] Respondent suggests that the Ninth Circuit decision in *Casavantes v. California State University*, 732 F. 2d 1441 (9th Cir. 1987), did not uphold section 1601.12(b), but merely relied on "equitable considerations" to permit relation-back of verification. (Br. Opp. 8). That is not correct. The Ninth Circuit opinion rests squarely on the regulation.

> Casavantes argues that his filing of an Intake Questionnaire satisfied the statutory obligation to initiate the administrative process within the required 300-day period. We agree. . . .
>
> The University . . . notes that both Title VII and its accompanying regulation provide that a charge shall be . . . verified, . . . and that no spaces are provided on the Intake Questionnaire for . . . verification . . .
>
> We observe that the same regulation permitting wide latitude in the content of the charge also includes an amendment procedure . . . . 29 C.F.R. § 1601.12(b). Consequently, while Casavantes' questionnaire was not signed or verified, those deficiencies were cured by Amendment when the formal charge document was filed . . . .

732 F. 2d at 1442-43; *see id.* at 1443 n. 2.

Respondent asserts that the decision of the District of Columbia Circuit in *Simpkins v. Washington Metropolitan Transit Authority*, 1997 WL 702349 (D.C.Cir. 1997), is really a decision about "equitable tolling," and that the decision's reference to the regulation is only "in dicta." (Br. Opp. 8 n. 6). That is not correct. The court of appeals unequivocally relied on section 1601.12(b) in holding the limitations issue in that

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[6] The Seventh Circuit's discussion of the content and agency handling of Philbin's allegations concerned, not the verification issue, but whether those allegations, *verified or not*, were otherwise sufficient under Title VII. 929 F. 2d at 324-25. The Brief in Opposition, carefully read, recognizes this distinction. (Br. Opp. 6)(the court of appeals held that the intake questionnaire "qualified as a charge and could therefore be verified after the statutory period had run.")

case was to be resolved by reference to the date on which the EEOC received the plaintiff's unsworn letter rather than on the date of a later verified charge.[7] The equitable tolling issue in *Simpkins* related to when the 180 day period *began* to run, not when it ended.[8]

Respondent contends that the Second Circuit decision in *EEOC v. Sears, Roebuck & Co.*, 650 F. 2d 14 (2d Cir. 1981) was based on "equitable considerations," not on section 1601.12(b). That is incorrect.

> Federal regulations have treated the "failure to swear" as a technical defect curable by amendment. . . . 29 C.F.R. § 1601.12(b) . . . The defect was cured . . . . Although a complete absence of verification affords a basis for dismissal, . . . a mere defect in title at the time of verification does not.

650 F. 2d at 18.

Respondent acknowledges that several Fifth Circuit decisions have held that section 1601.12(b) is valid. Respondent contends, however, that the Fifth Circuit's pre-1972 decisions are distinguishable because the language of Title VII was amended in 1972. (Br. Opp. 7 n. 2). But subsequent to 1972 the Fifth Circuit has twice reaffirmed its approval of section 1601.12(b).

> Prior to passage of the 1972 amendments to Title VII of the 1964 Civil Rights Act, we rejected arguments that charges must be . . . sworn to within the applicable time period, despite the statutory requirement that private complainants file a written

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[7] 1997 WL 702349 at *3 ("Simpkins filed her charges in a letter that her attorney transmitted to the EEOC by telecopier on June 24, 1993. Although Title VII provides that a charge 'shall be in writing under oath or affirmation,' 42 U.S.C. § 2000e-5(b); . . . and although Simpkins did not file a sworn charge until July 28, 1993, the later filing amended the earlier one, and such 'relate[s] back to the date the charge was first received.' 29 C.F.R. § 1601.12(b). Simpkins filing was timely, however, only if the filing period had not run for more than 180 days as of June 24, 1993.")

[8] 1991 WL 702349 at *4-*6.

> charge under oath . . . . Although 42 U.S.C. § 2000e-5(b), as amended in 1972, now requires the filing of charges in writing under oath or affirmation by both private parties and the EEOC, we are not persuaded the amended statute compels a different conclusion.
>
> Because of the regulatory provision for cure of technical or procedural defects in 29 C.F.R. § 1601.12(b), we do not, in keeping with our past decisions, view the verification element as jurisdictional.

Price v. Southwestern Bell Telephone Co., 687 F. 2d 74, 77-78 n. 3 (5th Cir. 1982); see *Tillman v. City of Boaz*, 548 F. 2d 592, 593 n. 1 (5th Cir. 1977).[9]

Respondent suggests that the Tenth Circuit has adopted a "requirement" that section 1601.12(b) be limited to cases in which the delayed verification did not prejudice the employer. (Br. Opp. 7). That is not correct. Although the circumstances of *Peterson v. City of Wichita*, 888 F. 2d 1307 (10th Cir. 1989), involved no such prejudice, the opinion does not hold that the regulation would be invalid if prejudice were shown. The Tenth Circuit's later decision in *Welsh v. City of Shawnee*, 1999 WL 345597 (10th Cir.), disavowed any such limitation in *Peterson*.[10] If the Tenth Circuit had indeed adopted the position described by respondent, that would exacerbate rather than reduce the conflict. A holding that section 1601.12(b) is invalid if, but only if, an employer is prejudiced would conflict with the Fourth Circuit's decision that the regulation is always invalid, and with the decisions of the Second, Fifth, Sixth, Seventh, Ninth and District of Columbia Circuits that the regulation is valid without limitation.

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[9] "Letters such as the one written by Tillman are sufficient to initiate the processes of the EEOC. . . . *Georgia Power Co. v. Equal Employment Opportunity Commission*, 412 F. 2d 462 (5th Cir. 1969)."

[10] 1999 WL 345597 *5 n. 6 ("In this circuit, we have held that a subsequently filed formal charge may amend the plaintiff's unverified but timely filed EEOC 'complaint' under 29 C.F.R. § 1601.12(b), at least where there is no showing of prejudice to the charged party. See *Peterson v. City of Wichita*.")

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

LEONARD EDELMAN, PETITIONER

v.

LYNCHBURG COLLEGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

A regulation of the Equal Employment Opportunity Commission (EEOC), 29 C.F.R. 1601.12(b), implementing Title VII of the Civil Rights Act of 1964 provides that a charge of employment discrimination filed with EEOC may be amended to cure "technical defects or omissions, including failure to verify the charge," and that such an amendment to verify the charge "will relate back to the date the charge was first received" by EEOC, even if the verification of the charge is made after the statutory limitation period for filing a charge of discrimination, as long as the charge of discrimination was first received by EEOC during that statutory limitation period. The questions presented are whether 29 C.F.R. 1601.12(b) is valid, and if not, whether petitioner permissibly relied on that regulation so as to warrant the application of equitable tolling of the limitation period on the facts of this case.

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In the Supreme Court of the United States

No. 00-1072

LEONARD EDELMAN, PETITIONER

v.

LYNCHBURG COLLEGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. On June 6, 1997, respondent, a private college, denied tenure to petitioner, a member of the faculty. Pet. App. 2a. On November 14, 1997 (160 days later), petitioner sent a detailed letter to the Equal Employment Opportunity Commission (EEOC or Commission), alleging that respondent denied him tenure because of his sex and that respondent's dean was systematically purging white men from the faculty. C.A. App. 61-65. Petitioner ended the letter by stating, "I hereby file a charge of employment discrimination against Lynchburg College * * * and I call upon the EEOC to

investigate this case in an attempt to rectify this unjust and unfair situation before any more people are subjected to this illegal discrimination." *Id.* at 64-65. The letter was signed by petitioner but was not executed under oath or affirmation. *Id.* at 65.

On November 26, 1997, petitioner's attorney wrote to EEOC, stating that petitioner "would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Pet. App. 2a. That letter added that "[i]t is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct." *Ibid.*

On December 3, 1997, an EEOC employee sent petitioner a form letter, without acknowledging the letter from his attorney. That form letter stated that petitioner should telephone EEOC to arrange an interview. Petitioner's interview was eventually scheduled for March 3, 1998. After the interview, an EEOC employee drafted an EEOC Form 5 Charge of Discrimination and mailed it to petitioner on March 18, 1998, for petitioner's review and verified signature. EEOC received the verified charge from petitioner on April 15, 1998, 313 days after the last alleged discriminatory employment practice. On March 26, 1999, after completing its investigation, EEOC issued petitioner a notice of right to sue. Pet. App. 2a-3a.

2. Petitioner initially filed suit against respondent in Virginia state court and alleged various state-law claims. He subsequently added a count alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1). Respondent removed the action to federal district court and then moved to dismiss the Title VII claim on the

ground that petitioner had failed to file a valid charge of discrimination with EEOC within the applicable statutory limitation period. Respondent argued that petitioner did not file a charge of discrimination until EEOC received the verified Form 5 Charge on April 15, 1998, after the expiration of the applicable 300-day limitation period for filing a charge of discrimination with EEOC. See 42 U.S.C. 2000e-5(e)(1).[1] Petitioner contended that his initial letter of November 14, 1997, complaining of discrimination was a timely charge of discrimination, and that, under an EEOC regulation, 29 C.F.R. 1601.12(b), his subsequent submission of a verified charge form related back to that date. Although respondent acknowledged that regulation, it argued, *inter alia*, that the regulation conflicted with the underlying statute. See Br. in Opp. 5 n.1.

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[1] The basic limitation period for filing a charge of discrimination in violation of Title VII with EEOC is 180 days after the unlawful employment practice. 42 U.S.C. 2000e-5(e)(1). However, if the complainant has filed a discrimination charge with a state or local government agency that has legal authority to "grant or seek relief" from the alleged unlawful employment practice, then the statutory limitation period for filing a charge with EEOC is 300 days. 42 U.S.C. 2000e-5(e)(1). (Such state and local agencies are commonly referred to as "deferral" agencies. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988); *Tinsley* v. *First Union Nat'l Bank*, 155 F.3d 435, 439-442 (4th Cir. 1998).) In addition, if a complainant submits a charge of discrimination to EEOC based on employment practices that occurred in a State or locality that has a "deferral" agency, EEOC will "defer" the discrimination charge to the appropriate state or local agency, even if the complainant has not filed a discrimination complaint directly with that state or local agency. See 29 C.F.R 1601.13(a)(3) and (4), 1601.13(c); *Tinsley*, 155 F.3d at 439. Virginia has such a deferral agency, the Virginia Council on Human Rights. See 29 C.F.R. 1601.74(a); *Tinsley*, 155 F.3d at 440.

The district court agreed with respondent that petitioner had failed to file a timely charge of discrimination, dismissed petitioner's Title VII claim, and remanded the remainder of the case to state court. Pet. App. 16a-17a. Although the district court noted that petitioner initially wrote to EEOC to complain about employment discrimination by respondent on November 14, 1997, and that his attorney also wrote to EEOC on November 26, 1997—both dates well within the 300-day limitation period—it concluded that "neither [petitioner] nor the EEOC proceeded as if the November 1997 letter[s] did, or were intended to, commence proceedings." *Id.* at 22a-23a. The district court observed that, although Title VII provides that EEOC shall serve notice of a charge of discrimination on the employer within ten days of the filing of the charge, see 42 U.S.C. 2000e-5(b), EEOC did not serve notice of a discrimination charge on respondent within ten days of either of the November 1997 letters, petitioner's counsel requested that notice of the charge of discrimination not be served on respondent until after petitioner's interview with EEOC staff, EEOC did not assign a charge number to petitioner's case until after petitioner submitted his verified charge form in April 1998, and EEOC did not refer either of the November 1997 letters to the Virginia Commission on Human Rights. Pet. App. 22a; see p. 3 note 1, *supra*. The district court also ruled that petitioner was not entitled to equitable tolling of the 300-day limitation period in this case because, among other reasons, he received the charge of discrimination prepared by EEOC within the 300-day limitation period and could have returned the verified charge in a timely fashion so as to preserve his rights. *Id.* at 23a.

3. The court of appeals affirmed, but the panel was divided in its reasoning. See Pet. App. 1a-13a (majority); *id.* at 14a-15a (concurrence).

a. The majority rejected petitioner's contention that, under the EEOC regulation, 29 C.F.R. 1601.12(b), petitioner's initial, non-verified letter complaining about discrimination complied with the 300-day limitation period and his subsequent verification of his charge of discrimination related back to the date of that initial complaint. The majority did not take issue with petitioner's submission that his initial, non-verified letter to EEOC was actually treated by the Commission as a charge of discrimination. It concluded, however, that EEOC's regulation permitting the verification of the charge to relate back to the filing of the initial charge is contrary to the statute and therefore invalid. Pet. App. 1a-2a.

The majority applied the framework for review of agency regulations established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). See Pet. App. 5a. Identifying "[t]he precise question at issue in this case" as "whether verification must occur within the statutory limitations period," the court ruled that "Congress has unambiguously spoken" on that question. *Id.* at 6a. The court noted that 42 U.S.C. 2000e-5(b) specifically requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The "plain meaning of this language," stated the court, "compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, * * * it is not a charge." Pet. App. 6a. In addition, it stated that 42 U.S.C. 2000e-5(e)(1) "affirmatively and plainly establishes the time period within which a charge must

be filed." Pet. App. 6a. Thus, the court concluded, "[b]ecause a charge requires verification [and] because a charge must be filed within the limitations period, it follows that a charge must be verified within the limitations period." *Ibid.* (citations omitted). Based on that conclusion, the court also rejected petitioner's argument that EEOC's regulation is entitled to deference: "[T]o the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII * * * [and] contravenes Congress's intent, as expressed through the plain language of the statute." *Ibid.*

The majority acknowledged that its holding conflicts with decisions of four other circuits that have held that a verified charge of discrimination filed outside the statutory limitation period may relate back to an unverified charge of discrimination filed within that period. See Pet. App. 9a-11a (citing cases). The court nonetheless disagreed with those decisions on the ground that they "improperly substitute policy justifications for clear statutory language." *Id.* at 11a.

Finally, the majority rejected petitioner's argument that the limitation period should be equitably tolled in this case. Pet. App. 12a. The court ruled that the facts of this case did not warrant equitable tolling because petitioner had been represented by counsel at all stages of the administrative process, and because petitioner waited a few months after the alleged discrimination before contacting the Commission. The majority also noted, as had the district court, that EEOC mailed the draft charge to him before the expiration of the limitation period, and that petitioner could have signed and returned the draft within that period. *Ibid.*

b. Judge Luttig concurred only in the judgment of the court. Pet. App. 14a-15a. He would have affirmed the dismissal of petitioner's claim on a narrower ground similar to that relied on by the district court, namely, that petitioner did not intend his initial letter to EEOC to be treated as a charge of discrimination. *Id.* at 14a. Judge Luttig stated that he was "sufficiently uncomfortable" with the broader ground relied on by the majority—namely, that "verification may never relate back" after expiration of the limitation period—that he was unable to concur in that ruling. *Ibid.*

Judge Luttig noted that "we are not confronted with a single statute stating either by terms or in effect that 'a verified charge must be filed within [300] days of a discriminatory action.'" Pet. App. 14a. Rather, he observed, "we are presented with two statutes, the first providing that a charge shall be filed within [300] days of the unlawful employment practice, and the second providing that charges shall be in writing and include an oath or affirmation." *Ibid.* He further noted that "there is not *necessarily* the nexus required" between those two statutes to sustain the majority's reading. *Ibid.* "[I]f the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the [300] days, and relation back would be available by regulation." *Ibid.*

Finally, Judge Luttig observed, "there is no statutory definition of 'charge'" in Title VII. Pet. App. 14a-15a. Therefore, he continued, "the 'charge' that must be filed within [300] days need not—at least need not by definition—be an allegation that is verified * * * . Insofar as the statute informs us, the 'charge' that must be filed within [300] days can be merely an allegation of discrimination; it need not be verified." *Id.* at 15a.

Because he did not find EEOC's construction of Title VII on which the regulation is based to be contradicted by anything in the statute itself, he would have deferred to that administrative interpretation. *Ibid.*

DISCUSSION

The EEOC regulation at issue in this case permits the Commission to take action on a charge of discrimination under Title VII as long as the charge is submitted in writing to the Commission within the statutory limitation period and that charge is verified by the complainant, even though the charge is not verified during the limitation period. The regulation allows a later verification to relate back to the original filing date of the unverified charge. That regulation is of considerable importance to EEOC's enforcement of Title VII, because the great majority of discrimination complaints are submitted by individuals who are unlikely to know at the time of submission that the charge must be verified. The importance of that regulation, in practical terms, to EEOC's enforcement responsibilities counsels in favor of this Court's review.

The court of appeals' decision, moreover, is erroneous. While Title VII does provide that a charge of discrimination must be filed with EEOC within the statutory limitation period and also provides that a charge must be verified before EEOC may require the respondent to participate in its investigation, the statute does not require that the charge be verified during the statutory limitation period. The court of appeals' decision also conflicts with the decisions of several other circuits. The Court should therefore grant review to resolve this important issue concerning

the administration of federal employment-discrimination law.[2]

1. The regulation at issue in this case provides in pertinent part:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments * * * will relate back to the date the charge was first received.

29 C.F.R. 1601.12(b). This regulation takes account of two significant realities in Title VII enforcement. First, the vast majority of individuals who contact EEOC to complain about alleged employment discrimination are laypersons acting without legal assistance. Those complainants are not likely to know, at least when they initially contact the Commission, that a complaint of discrimination must be verified by oath or affirmation. Second, the limitation periods for filing an administrative charge of discrimination with EEOC are unusually short: 180 days after the alleged unlawful employment practice, or 300 days in States and localities with their own employment-discrimination agencies authorized to grant or seek relief. 42 U.S.C. 2000e-5(b); see p. 3 note 1, *supra*.

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[2] The court of appeals' further ruling, rejecting equitable tolling on the particular facts of this case, does not appear to raise any broad issues of federal law concerning the standards governing equitable tolling or to conflict with the decision of any other court of appeals. We therefore recommend that the Court grant review only on the first question presented.

Thus, complainants may send letters to EEOC near the end of the limitation period, intending thereby to file charges of discrimination, without being aware that the charge must be verified. The regulation at issue here ensures that such persons will not unwittingly forfeit their rights to pursue remedies for unlawful discrimination. It also authorizes EEOC to investigate their allegations of discrimination, which the Commission could not do if the unverified charge were viewed as not timely filed.[3]

In addition, EEOC's practice has long been to have Commission staff prepare a short formal charge of discrimination (the Form 5) for the complainant to review and to execute under oath or affirmation, once the staff has distilled the essence of the allegation from contacts with the complainant. See, *e.g.*, C.A. App. 51. This practice simplifies EEOC's enforcement of Title VII by clarifying and focusing the complainant's allegation as well as the inquiry that EEOC then makes of the employer. That process also takes time, however.[4]

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[3] Under Title VII and the Americans with Disabilities Act of 1990 (ADA), EEOC may investigate only matters that are tied to charges of discrimination that have been filed with the Commission. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64 (1984) (Title VII); 42 U.S.C. 12117(a) (same enforcement provisions made applicable to ADA).

[4] That is particularly true in the great majority of instances in which individuals complaining of discrimination initially contact EEOC by mail or telephone. When an individual initially contacts EEOC by telephone, a member of the Commission staff may discuss the matter with the caller to make sure that the person's complaint is not more appropriately directed to another agency (such as the Department of Labor or the National Labor Relations Board), and then typically sends that person an intake sheet or questionnaire to fill out in his own words and to return to the Commission. Once that intake sheet or questionnaire is returned to

Because complainants often do not live near an EEOC office, the process of transferring the individual's allegations to a Form 5 Charge of Discrimination ready for execution and verification usually involves correspondence by mail between the Commission and the complainant. The process of preparing a verified charge of discrimination may take several weeks.

Thus, even when a complainant sends the Commission a detailed written letter setting forth the basis for his allegation of discrimination well within the statutory limitation period, it will often be impracticable for the Commission to prepare, and the complainant to verify, a Form 5 Charge of Discrimination before the short limitation period has elapsed. If such an initial written (but unverified) submission to the Commission were not treated as a timely filing of a charge, EEOC would likely lose the opportunity to investigate allegations of discrimination in many cases, and individuals would lose the opportunity to obtain relief as well.[5]

EEOC, a Commission staff person will then examine the case further, may schedule an interview with the complainant (in person or by telephone), and may eventually prepare a Form 5 Charge of Discrimination for the complainant to verify and execute. Under the EEOC regulation at issue here, a complainant's telephone call may not be treated as a charge of discrimination; a charge must be in writing. See 29 C.F.R. 1601.12(b).

[5] In addition, the Commission has entered into memoranda of understanding (MOUs) with several other federal agencies, pursuant to which complaints of discrimination filed initially with those other agencies are referred to EEOC for investigation as though they had been filed under Title VII or the ADA. See, *e.g.*, 8 FEPM 403:3005 (1999) (EEOC's MOU with Department of Labor's Office of Federal Contract Compliance Programs); see also 42 U.S.C. 12117(b) (requiring agencies to avoid duplication of effort in investigating ADA complaints, and requiring coordinating

2. The court of appeals erred in invalidating the EEOC regulation. Contrary to the court's decision, the regulation is not inconsistent with any provision of Title VII, and it constitutes a reasonable exercise of EEOC's authority under Title VII to fashion procedural rules for the investigation of administrative complaints of discrimination. The court therefore should have upheld the regulation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Section 706 of Title VII, 42 U.S.C. 2000e-5, sets forth various provisions governing EEOC's enforcement authority. Section 2000e-5(b), addressing EEOC's administrative treatment of charges of discrimination, states that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 2000e-5(e), governing the time for filing charges with EEOC, separately provides that a charge "shall be filed" within 180 days after the alleged unlawful employment practice, or, in States such as Virginia with "deferral" agencies (see p. 3 note 1, *supra*), within 300 days. Thus, under Title VII, a charge of discrimination must be verified under oath or affirmation by the complainant, and the charge must be timely filed.

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mechanisms such as MOUs). The regulations governing complaints under anti-discrimination provisions, such as Executive Order No. 11,246 (3 C.F.R. 167 (1965 Supp.)), that are enforced by those other agencies do not require verification as a prerequisite to proper filing of a charge of discrimination. The court of appeals' decision, if allowed to stand, would impair EEOC's ability to investigate discrimination complaints that are submitted to other agencies in a timely fashion and are promptly referred to EEOC by those other agencies but are not verified by the complainant within the statutory limitation period.

As Judge Luttig observed (Pet. App. 14a), however, neither Section 2000e-5 nor any other provision of Title VII requires that the charge be *verified* within the limitation period for filing charges. As long as the charge is timely filed with EEOC, Title VII does not preclude a complainant from subsequently rectifying formal errors in the charge, including the lack of verification, after the expiration of the limitation period. Nor does anything in Title VII require EEOC to disregard a written, detailed complaint of employment discrimination as a nullity before it has been verified by the complainant, even if it has been submitted to EEOC within the limitation period. Cf. *Becker* v. *Montgomery*, No. 00-6374 (May 29, 2001), slip op. 4-5 (although Federal Rule of Appellate Procedure 4(a)(1) requires notice of appeal to be timely filed in district court, and Federal Rule of Civil Procedure 11(a) separately requires every paper filed in district court to be signed, neither Rule provides "that the signature requirement cannot be met after the appeal period expires").

In other words, the governing statute does not speak directly to the matter at hand. Accordingly, EEOC's regulation should be upheld if it represents a reasonable exercise of EEOC's statutory authority over the procedural requirements for the proper filing and treatment of administrative charges. See 42 U.S.C. 2000e-12(a) (authorizing EEOC "to issue, amend, or rescind suitable procedural regulations to carry out the provisions of [Title VII]"); 42 U.S.C. 2000e-5(b) (charges "shall contain such information and be in such form as the Commission requires"); see also *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, * * * need only be reasonable to be entitled to deference."); *id.* at 125

(O'Connor, J., concurring in part and concurring in the judgment) (deference is "particularly appropriate" when regulation involves a "technical issue of agency procedure").

Deference is particularly appropriate here because EEOC adopted the regulation shortly after the passage of Title VII and has retained it ever since. See *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (EEOC's "contemporaneous construction" of Title VII "deserves special deference when it has remained consistent over a long period of time"). The relation-back provision now found at 29 C.F.R. 1601.12(b) was initially promulgated in 1966, just two years after Title VII was enacted. See 31 Fed. Reg. 10,269. Despite minor changes in the citation and wording, the substance has remained essentially the same.[6] Moreover, although Congress has amended Title VII several times, including amendments to Section 2000e-5 in 1972 (see Pub. L. No. 92-261, § 4, 86 Stat. 104), it has not overridden the regulation by adding a limitation period to the verification requirement in Section 2000e-5(b) or a verification requirement to the limitation period in Section 2000e-5(e). Cf. *Associated Dry Goods*, 449 U.S. at 600 n.17 (Congress's failure to disapprove EEOC regulation "suggests its consent to the Commission's practice.").[7]

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[6] Compare 29 C.F.R. 1601.12(b) (2000) ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge * * * . Such amendments * * * will relate back to the date the charge was first received.") with 29 C.F.R. 1601.11(b) (1966) ("A charge may be amended to cure technical defects or omissions, including failure to swear to the charge * * * and such amendments relate back to the original filing date.").

[7] Congress was presumably aware that, before 1972, courts of appeals had uniformly held, consistent with EEOC's 1966 regulation, that a verification of a charge outside the charge-filing period could relate back to the initial filing of the charge, if that initial filing was timely. See *Blue Bell Boots* v. *EEOC*, 418 F.2d 355, 357 (6th Cir. 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 230-231 (5th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 360 (7th Cir. 1968). Some courts have questioned whether, in the 1972 amendments, which modestly changed the language of Section 2000e-5, Congress intended to convert the verification provision from a "directory and technical" provision to one that is "mandatory and substantive." See *Vason* v. *City of Montgomery*, 240 F.3d 905, 907 n.2 (11th Cir. 2001). The scant legislative history of that amendment, however, suggests that Congress assumed that even pre-1972 law required charges by aggrieved persons to be in writing under oath at some point. The 1972 amendment to Section 2000e-5(b) permitted charges also to be filed "on behalf of" aggrieved persons, and extended the verification requirement to all charges, including Commissioner's charges and the new "on-behalf-of" charges. See Section-by-Section Analysis of H.R. 1746, 118 Cong. Rec. 7166 (1972). The amended provision, however, did not require that verification occur within the charge-filing period.

The regulation reflects EEOC's long-standing understanding that, while Title VII does require that a charge be verified by the complainant before EEOC may take action against the respondent, it does not require that the charge be verified before the expiration of the statutory limitation period. Accordingly, under the regulation, a complainant's verification of the charge may relate back to a charge that was filed during the proper period. That regulation is reasonable and consistent with the purposes of both the verification requirement and the statute of limitations. The verification requirement is intended to prevent harassment of employers with frivolous charges by impressing on complainants the gravity of filing a charge of discrimination and the obligation to tell the truth in doing so. See *Blue Bell Boots* v. *EEOC*, 418 F.2d 355,

357 (6th Cir. 1969); see also *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 76 n.32 (1984) (the "function of an oath is to impress upon its taker an awareness of his duty to tell the truth"). That purpose is satisfied as long as the charge is sworn to or affirmed before the employer must cooperate in the investigation. Under EEOC practice, the complainant must submit a verified charge before EEOC will require a response from the employer, and that procedure was followed in this case. See C.A. App. 52.[8]

On the other hand, "[t]he limitations periods [of Title VII], while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256-257 (1980); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983). A complainant who, in compliance with an EEOC regulation, submits within the applicable time period a detailed letter to EEOC that explains the factual basis for his claim of discrimination and identifies the alleged responsible parties cannot be said to have slept on his rights. The short deadlines imposed by Title VII also ensure that, even when the charge is formally verified and EEOC's contacts with the employer are initiated after the limitation period has expired, there is little danger that employers will find themselves obligated to defend against decisions

[8] EEOC's regulation is also consistent with the statute's requirement that a formal charge be filed with the Commission. The purpose of such a charge is to inform the Commission that the respondent may have violated Title VII. See *Shell Oil*, 466 U.S. at 68. That purpose is fulfilled if the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of," as required by 29 C.F.R. 1601.12(b).

that are "long past." As this case demonstrates, when a complainant submits a written but unverified charge of discrimination to the Commission, EEOC contacts the complainant to obtain further information about the charge in a personal interview and may eventually prepare a charge form for the complainant to sign and verify. See C.A. App. 51, 88. EEOC's practice is to warn complainants that, unless they follow up on the initial unverified letter charging discrimination by scheduling an interview within 30 days, EEOC will assume the complainant did not intend to file a charge and will not proceed further. *Id.* at 88. Combined with Title VII's short limitation periods, that practice minimizes the risk that an employer will be surprised with a charge of discrimination years after the alleged unlawful employment practice.[9]

The EEOC regulation is also consistent with this Court's decisions recognizing that Title VII complaints are usually filed with the Commission by laypersons without the assistance of trained lawyers, and so the statute's charge-filing requirements should not be construed in a highly technical manner that would impede discrimination charges from being filed by complainants and investigated by the Commission. See *Commercial Office Prods.*, 486 U.S. at 123-124; *Zipes* v. *Trans World Airlines, Inc.* 455 U.S. 385, 397-398 (1982); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 816 n.19 (1980); *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972); see also *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (Age Discrimination in Employment Act of 1967). Those observations are particularly appropriate with regard

[9] In this case, for example, EEOC notified respondent of petitioner's charge of discrimination on April 21, 1998, well within a year of the alleged violation of Title VII. See C.A. App. 52.

to Title VII's requirement that a charge be verified, a requirement of which the vast majority of complainants would likely be unaware before contacting the Commission.

3. The decision of the court of appeals also warrants review because the circuits have reached conflicting views about the validity of the EEOC regulation at issue here. The Eighth Circuit, like the Fourth, has concluded that a charge must be verified as well as filed within the limitation period and has therefore invalidated the EEOC regulation.[10] The other courts of appeals that have considered the matter have held, consistent with EEOC's regulation, that verification may occur outside the charge-filing period and may relate back to a timely-filed but unverified charge.[11]

That conflict in the circuits is particularly deserving of this Court's review, even beyond the traditional considerations governing certiorari (see Sup. Ct. R. 10(a)), because several EEOC district offices serve individuals in more than one of the circuits, including circuits with conflicting rulings on the EEOC regulation at issue

[10] See *Shempert* v. *Harwick Chem. Corp.*, 151 F.3d 793, 796-797 (8th Cir. 1998), cert. denied, 525 U.S. 1139 (1999); *Schlueter* v. *Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998).

[11] See *Philbin* v. *General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 323-324 (7th Cir. 1991); *Peterson* v. *City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990); *Casavantes* v. *California State Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984); *Blue Bell Boots*, 418 F.2d at 357 (Sixth Circuit); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 230-231 (5th Cir. 1969); see also *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981) (upholding validity of Commissioner's charge verified by Commissioner after term had expired).

here.[12] EEOC offices processing charges from States within the Fourth and Eighth Circuits must now attempt to ensure that charging parties in those States verify their charges within the charge-filing period, despite EEOC's contrary regulation and field guidance, and despite the fact that charging parties from other States who file charges in the same district offices are entitled to the benefit of EEOC's relation-back regulation. Nor is the uncertainty limited to the enforcement of Title VII itself. Because the Americans with Disabilities Act of 1990 (ADA) incorporates by reference Title VII's procedural provisions (see 42 U.S.C. 12117), the uncertainty carries over to charges of discrimination under the ADA filed with EEOC. This Court's resolution of the conflict is needed to ensure uniform treatment of charges of discrimination that are filed with EEOC during the statutory limitation period but are not verified until after that period has expired.

4. Respondent does not dispute that there is a conflict in the circuits on the validity of the EEOC regulation. Respondent argues rather that this case does not present an appropriate occasion for this Court to consider that issue because, it maintains, petitioner's

[12] EEOC's Milwaukee District Office encompasses parts of the Seventh and Eighth Circuits; the Denver Office includes parts of the Eighth and Tenth Circuits; the St. Louis Office covers parts of the Eighth, Seventh, and Tenth Circuits; and the Memphis District Office spans parts of the Sixth and Eighth Circuits. Those offices serve areas in circuits with directly conflicting decisions. In addition, other EEOC offices serve areas within one circuit that has invalidated the regulation and one or more circuits that have not ruled on the matter but where the regulation is still in force. The Philadelphia District Office covers parts of the Third and Fourth Circuits, and the Baltimore District Office covers a part of the Fourth Circuit and the D.C. Circuit.

initial November 14, 1997, letter was not intended to be a charge of discrimination and was not treated by EEOC as a charge. See Br. in Opp. 4-9; but see C.A. App. 80-81, 90-91 (declarations submitted to district court by EEOC employees to the effect that they treated petitioner's initial letter as a charge). Respondent points out (Br. in Opp. 4-5) that both the district court and Judge Luttig would have resolved this case on that narrower ground without reaching the validity of the regulation.

Nonetheless, the panel majority addressed the validity of the EEOC relation-back regulation, invalidated that regulation, and resolved the case on that basis, and not on the alternate ground suggested by Judge Luttig. The panel's holding that the EEOC regulation is invalid, and that under no circumstances may the verification of a charge of discrimination relate back to the initial timely filing of an unverified charge, is binding precedent in the Fourth Circuit. The Commission is obligated to follow that precedent in cases arising from that circuit, even though (as noted above, see p. 19 and note 12, *supra*) the Commission's offices in Baltimore and Philadelphia cover both the Fourth Circuit and another circuit where its relation-back regulation is still applicable. Should this Court reverse the court of appeals' decision and hold that that regulation is valid, respondent will be able to present on remand its alternate argument that the regulation was not satisfied in this case because petitioner's November 14, 1997, letter was not a charge of discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted as to the first question presented.

Respectfully submitted.

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JUNE 2001

Supreme Court, U.S.
FILED
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10

No. 00-1072

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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98 pp

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U.S. District Court
Western District of Virginia (Lynchburg)

CIVIL DOCKET FOR CASE #: 99-CV-60

LEONARD EDELMAN, Dr.
plaintiff

v.

LYNCHBURG COLLEGE
defendant

Filed: 07/08/99
Jury demand: Plaintiff
Assigned to: Judge Norman K. Moon
Referred to: Magistrate Judge Glen E. Conrad
Demand: $2,350,000
Nature of Suit: 442
Lead Docket: None
Jurisdiction: Federal Question:
Dkt # in Lynchburg Circuit : is CL99021183

Cause: 42:2000 Job Discrimination (Sex)

Proceedings include all events.

7/8/99	1	NOTICE OF REMOVAL with Attachment; FILING FEE $150.00; RECEIPT #92567 (sfc) [Entry date 07/08/99] [Edit date 07/09/99]
7/9/99	2	ORDER, Requesting Transmittal of Original Case File from Lynchburg Circuit Court (signed by Judge Norman K. Moon) [EOD Date 7/9/99] (mcp) [Entry date 07/09/99]

7/9/99	--	Magistrate's Notice (mcp) [Entry date 07/09/99]
7/14/99	3	STATE COURT RECORDS from Lynchburg Circuit Court (mcp) [Entry date 07/14/99]
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7/16/99	5	PRETRIAL ORDER, Referring Case to Magistrate Judge Glen E. Conrad for all pretrial discovery motions and issues and whatever else as set forth in Items 1-12 of Order re: trial date, status reports, jury instructions, motions, briefs, hearings discovery, witnesses, and settlement of case (signed by Judge Norman K. Moon) [EOD Date7/16/99] (mcp) [[Entry date 07/16/99]
7/21/99	6	LETTER MOTION for approval of deadlines by Leonard Edelman (mcp) [Entry date 07/22/99]
7/27/99	7	ORDER granting [6-1] motion for approval of deadlines, plaintiff's response due 8/10/99, defendant's reply due 8/19/99, and Motion Hearing set for 1:30 8/24/99 for [4-1] motion to Dismiss [signed by Judge Norman K. Moon} [EOD Date 7/27/99] (sfc) [Entry date 07/27/99]

8/10/99	8	MEMORANDUM by Leonard Edelman in opposition to [4-1] motion to Dismiss by Lynchburg College (mcp) [Entry date 08/10/99]
8/19/99	--	Deadline updated; Motion Hearing RESET for 1:00 8/24/99 for [4-1] motion to Dismiss (NOTE: CHANGE IN TIME ONLY) (sfc) [Entry date 08/19/99]
8/19/99	9	REPLY by Lynchburg College to [8-1] Memorandum in Oppostion by Leonard Edelman to defendant's motion to dismiss (sfc) [Entry date 08/19/99]
8/24/99	--	COURT HEARING: Parties present by counsel for hearing on motion. Arguments. [4-1] motion to Dismiss under advisement. Order forthcoming (Judge Norman K. Moon OCR Aaron LaDuke) (emh) [Entry date 08/24/99]
8/30/99	10	TRANSCRIPT of Motion Hearing for date of 8/24/99 (OCR Aaron H. LaDuke) (mcp) [Entry date 08/30/99]
8/30/99	11	MOTION for Sanctions by Lynchburg College (sfc)
8/30/99	12	MEMORANDUM by Lynchburg College in support of [11-1] motion for Sanctions by Lynchburg College (sfc) [Entry date 08/30/99]

09/13/99	13	MEMORANDUM by Leonard Edelman in opposition to [11-1] motion for Sanctions by Lynchburg College (mcp) [Entry date 09/13/99]
09/20/99	14	MEMORANDUM OPINION (signed by Judge Norman K. Moon) (sfc) [Entry date 09/20/99]
09/20/99	15	ORDER granting [4-1] motion to Dismiss the Title VII Claims, and Remanding Remaining Claims to the Circuit Court for the City of Lynchburg (signed by Judge Norman K. Moon) [EOD Date 9/20/99] (sfc) [Entry date 09/20/99]
09/20/99	--	State Court Records Returned (our document #3) to Circuit Court for the City of Lynchburg (hand delivered) (sfc) [Entry date 09/20/99] [Edit date 09/20/99]
09/20/99	--	CASE CLOSED (sfc) [Entry date 09/20/99]
09/20/00	16	REPLY by Lynchburg College to response to [11-1] motion for Sanctions by Lynchburg College (sfc) [Entry date 09/21/99]
10/7/99	17	MEMORANDUM OPINION (signed by Judge Norman K. Moon) (sfc) [Entry date 10/07/99]
10/7/99	18	ORDER denying [11-1] motion for Sanctions (signed by Judge Norman K. Moon) [EOD Date 10/7/99] (sfc) [Entry date 10/07/99]

10/20/99	19	NOTICE OF APPEAL by Leonard Edelman. FILING FEE $105.00. RECEIPT #92643. Order appealed: 9/20/99 Order by Judge Norman K. Moon (sfc) [Entry date 10/20/99]
10/20/99	--	Transmittal Letter w/ Notice of Appeal and certified copy of docket to USCA re: [19-1] appeal by Leonard Edelman (sfc) [Entry date 10/20/99]
10/20/99	--	CERTIFICATE TO FOURTH CIRCUIT BY CLERK (sfc) [Entry date 10/20/99]

A TRUE COPY, TESTE:
MORGAN E. SCOTT, JR., CLERK
BY: /s/ Fay Coleman
DEPUTY CLERK

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF LYNCHBURG

DR. LEONARD EDELMAN
100 Crestview Drive
Forest, VA 24551

Plaintiff,

v. At Law: CL99021183

LYNCHBURG COLLEGE
1501 Lakeside Drive
Lynchburg, VA 24501

Serve: Alexander Bell
Registered Agent
715 Court Street
Lynchburg, VA 24505

Defendant.

FILED IN THE CLERK'S OFFICE OF THE
CIRCUIT COURT OF THE CITY OF LYNCHBURG
DATE JUN 10 1999 TIME 1:45 P.M.
TESTE: LARRY B. PALMER, CLERK
BY: /s/ Dep. Clerk

AMENDED MOTION FOR JUDGMENT

COMES NOW the Plaintiff, LEONARD EDELMAN, PH.D. ("Dr. Edelman"), by his undersigned counsel, and moves this Court for entry of judgment in his favor, and against defendant LYNCHBURG COLLEGE ("the College"), and in support of such motion alleges and avers as follows:

1. This is a civil action.

2. Plaintiff Leonard Edelman ("Dr. Edelman") alleges wrongful denial of tenure and termination in breach of his contract of employment with the College.

3. This action states federal claims against the defendant under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*.

4. This action also states claims of common law negligent retention, defamation, intention infliction of emotional distress and breach of contract.

PARTIES AND JURISDICTION

5. Dr. Edelman is a resident of Bedford County and a citizen of the Commonwealth of Virginia.

6. Lynchburg College is a Virginia corporation authorized to conduct business in the Commonwealth of Virginia, maintains a registered agent for service of process in the Commonwealth of Virginia, and regularly conducts business in the City of Lynchburg.

7. This Court has jurisdiction over Dr. Edelman' s claims under Title VII pursuant to 28 U.S.C. § 1343(a) and 42 U.S.C. § 2000e—5.

8. This Court has jurisdiction over Dr. Edelman's defamation, negligent retention, intentional infliction of emotional distress and breach of contract claims under the common law of Virginia.

9. Upon information and belief, Lynchburg College employs over 300 people and may employ over 500 people.

10. The amount in controversy in this action exceeds the jurisdictional minimum amount for this Court.

BACKGROUND

11. The College hired Dr. Edelman in August 1993 as an Assistant Professor of Biology on a tenure track. He received two years of credit on his tenure track for his prior teaching. Therefore, his probationary period was established at four years. He was eligible for tenure and promotion to Associate Professor as of September 1997.

12. Dr. Edelman and the College entered into a contractual employment relationship in August 1993. The Faculty Handbook of Lynchburg College (the "Handbook") was incorporated into this employment contract.

13. Under the terms of the employment contract, Dr. Edelman was given the expectation of receiving tenure and a promotion in 19497 if he performed his duties in a satisfactory manner. If the College decided not to grant tenure, it was to give Dr. Edelman one year's notice by way of a one year non-renewable contract extension.

14. Dr. Edelman was re-appointed for the next two academic years after receiving high commendations for all facets of his job performance, including commendations from students, faculty, staff, and administration.

15. College President Charles Warren appointed Dr. Edelman as a sexual harassment investigator in March 1995.

16. Jacqueline W. Asbury, Dean of the College, commended Dr. Edelman for his "initiative and effort in making the student research/grant workshop available to our campus colleagues" in May 1995.

17. On or about June 17, 1996, the parties entered into the last of these letter contracts ("the Contract"). The Contract specifically incorporated by reference the Handbook. The Contract is attached as Exhibit A. Applicable portions of the Handbook are attached as Exhibit B.

18. As part of the Contract, the College awarded Dr. Edelman a merit pay increase effective June 17, 1996, due to his excellence in teaching.

19. As part of the Contract, Dr. Edelman entered into the formal tenure evaluation process in the fall of 1996.

20. As part of the tenure evaluation process set forth in the Handbook, on October 14, 1996, the Chairman of the Biology Department, Dr. Orrie 0. Stenroos, strongly recommended Dr. Edelman for tenure.

21. Pursuant to the Handbook, Dr. Stenroos' s recommendation was reviewed by the Ad Hoc committee of the faculty and that committee voted unanimously to recommend tenure on November 18, 1996.

22. In late November 1996, Dean Asbury and President Warren required Dr. Edelman and other tenure candidates to meet with them to discuss their "perception and vision for the future of the college as well as [their] adaptability for the future." This meeting and discussion was not part of the tenure review process as set out in the Handbook.

23. Despite the unanimous recommendation of the Ad Hoc committee that Dr. Edelman be awarded tenure, on or about January 14, 1997, Dean Asbury notified Dr. Edelman she would not recommend him for tenure.

24. Upon receipt of Dean Asbury's memo, Dr. Edelman met with the Dean to discuss her recommendation. The Dean agreed to withhold her recommendation pending the submittal of additional materials by Dr. Edelman. During this same meeting, Dean Asbury informed Dr. Edelman that he had "something" hanging in his office that was offensive to women. Dean Asbury also made this comment about Dr. Edelman to Professor Stenroos. When Dr. Edelman asked Dean Asbury to describe the "something" that was offensive in his office, Dean Asbury was unable to recall any details about the item.

25. On January., 27, 1997, Dr. Edelman submitted a 47 page document entitled "Four Years of My Teaching Biology and My Students Learning Biology at Lynchburg College." This document detailed all facets of Dr. Edelman's teaching, his use of new teaching techniques, changes he instituted in his teaching of the introductory biology course, an analysis of intellectual development in student learning styles, summaries of undergraduate and collaborative research projects, an analysis of the student-teacher relationship, and other subjects. Dr. Edelman also submitted a four year biographic review he had used in his phytoremediation research project.

26. Dr. Darwin Jorgensen, Chairman of the Biology Department at Roanoke College, reviewed Dr. Edelman's summary and gave it high marks.

27. On February 10, 1997, Dean Asbury affirmed her decision not to recommend Dr. Edelman for tenure.

28. On February 14, 1997, Dr. Edelman wrote a letter to Dean Asbury outlining numerous factual and procedural concerns with the Dean's proposed recommendation. Receiving no response, on February 19, 1997, Dr. Edelman filed a grievance petition with the Faculty Grievance Committee.

29. The Faculty Grievance Committee conducted a thorough investigation of the tenure process as it related to Dr. Edelman. This committee interviewed Dean Asbury at length. In that interview, Dean Asbury acknowledged her disdain for the college's tenure review process. Dean Asbury acknowledged several instances where she did not abide by the procedures for tenure review set forth in the Handbook.

30. On April 2, 1997, the Faculty Grievance Committee issued a detailed report, unanimously finding that the college had violated the contractual provisions of the Handbook in its tenure review process of Dr. Edelman. A copy of this report is attached as Exhibit C.

31. In April 1997, President Warren proposed that he and Dr. Edelman agree that the department chair, the Ad Hoc committee, the personnel committee, and the Dean of the College could submit additional statements or clarifications of their positions regarding Dr. Edelman's tenure application.

32. On April 21, 1997, Dr. Edelman accepted President Warren's offer, but expressed reservations about adding this new step to the contractual review process in that it could set a precedent for future reviews. Two days later, Dr. Warren backed out of his proposal and refused to accept the additional submissions.

33. President Warren adopted Dean Asbury's recommendation not to offer tenure to Dr. Edelman. President Warren presented this recommendation to the Board of Trustees, which concurred.

34. On May 23, 1997, President Warren informed Dr. Edelman by letter that the Board of Trustees had accepted President Warren's recommendation not to award tenure to Dr. Edelman.

35. Dr. Edelman deserved to be granted tenure and to be promoted to the position of Associate Professor. Dr. Edelman taught seven different courses during a three year period. In his initial year, Dr. Edelman voluntarily undertook teaching two new courses, which he had not taught before and which were not part of his initial employment agreement, because Dr. Ralph Peters suddenly left the College. Dr. Edelman also mentored student research projects, acted as a freshman advisor, served as faculty advisor to the Biology Club, conducted career workshops for biology majors, attended seven workshops off campus for his own development and renewal, had a new course offering approved, took on overseeing the operation of the department greenhouse, and attended a number of conferences on college issues. Dr. Edelman also actively pursued research opportunities, even offering to contribute his own funds to research projects. He further developed collaborative research projects between undergraduate students and faculty.

36. Dean Asbury gave conflicting and disingenuous reasons for not recommending Dr. Edelman for tenure and violated the procedures of the Handbook in her assessment process.

37. President Warren, the Board of Trustees, and, therefore, Lynchburg College, relied on Dean Asbury's recommendation and adopted as their own Dean Asbury's reasoning behind this decision.

38. The College did not follow the procedures set forth in the Handbook for considering tenure applications and, therefore, breached its employment contract with Dr. Edelman.

Violations of the Faculty Handbook

39. The College violated the procedures of the Handbook and, therefore, of its contract with Dr. Edelman, in the following ways:

a. Requiring Dr. Edelman to submit to an interview with Dean Asbury and President Warren in November-December 1996 and relying on statements made at this meeting as part of the rationale for denying tenure to Dr. Edelman. In a memorandum dated February 10, 1997, Dean Asbury made vague reference to "materials presented for review and answers

to questions related to teaching" as part of her negative assessment. These materials and answers were never identified with any specificity, but apparently related to the earlier interview with Dr. Edelman. The Handbook did not include personal interviews with the Dean or President as part of the tenure review process.

b. Conducting informal interviews with other, unnamed people and using comments made by those people in the evaluation process.

In subsequently defending her recommendation in a letter dated February 10, 1997, Dean Asbury referred to unsolicited conversations she allegedly had with unnamed faculty members about Dr. Edelman. Neither this memorandum, the identity of these alleged persons, nor the fact—based content of these conversations were revealed. Dr. Asbury also noted she had "heard" that Dr. Edelman's first year of teaching had been a "total disaster." Dean Asbury made further reference to anonymous conversations that allegedly indicated Dr. Edelman was not a good teacher and had unduly negative opinions of the abilities of the student body. These conversations'' were not documented and the Handbook did not permit the College to rely on them in its tenure assessment of Dr. Edelman.

c. Using vague, undefined factors such as the number of Biology students and the "economic situation" of the College, without defining those factors or describing in detail how they impacted on her recommendation.

Dean Asbury never mentioned any concern about the decline in the number of biology majors or the economic situation of the college in her previous planning sessions with Dr. Stenroos, the Biology Department chairman. In fact, enrollment in biology actually increased during this time period rather than decreased. Dean Asbury later approved a request from the Biology Department to fund three additional faculty positions in the department, two of which would be tenured and one of which was Dr. Edelman's position. Dean Asbury later admitted that declining overall enrollment and declines in the number of biology majors were not factors in her decision not to recommend tenure for Dr. Edelman.

d. Falsely asserting that Dr. Edelman's teaching methods were unsound.

While Dean Asbury asserted she had "heard" that Dr. Edelman's first year of teaching had been a "disaster," Dean Asbury never observed Dr. Edelman personally teaching a class, even though Dr. Edelman invited her to do so on a number of occasions. Likewise, President Warren declined all invitations to observe Dr. Edelman's teaching methods. In fact, student evaluations of Dr. Edelman were overwhelmingly positive and his teaching methodology was praised by Dr. Jorgensen.

e. Asserting that Dr. Edelman did not engage in the necessary research for a tenure track faculty member, while simultaneously denying Dr. Edelman the opportunity to engage in research.

In fact, Dr. Edelman sought to engage in research but was repeatedly denied this opportunity by the College. The College denied Dr. Edelman's repeated requests for research supplies and even prohibited him from using his own money to buy supplies. Despite these obstacles, Dr. Edelman continued his efforts to engage in research. Interestingly, after Dr. Edelman's application for tenure was denied, he received the highest money grant for research at the college for that year.

f. Relying on the false and/or mistaken belief that Dr. Edelman had been relieved of his responsibilities for teaching freshman biology when, in fact, he had not.

g. Relying on the vague, false, and/or mistaken belief that Dr. Edelman was unnecessarily negative in his assessment of freshman biology students and using these criticisms to explain his alleged shortcomings.

In fact, Dr. Edelman made thoughtful and documented comments of the lack of motivation and other problems of his freshman students, but did not emphasize these concerns unduly.

These violations of the procedures of the Handbook for tenure decisions are set forth more fully in the Faculty Grievance Committee report, which is incorporated herein by

reference and attached as Exhibit *Religious and Ethnic Discrimination Issues*

40. Dr. Edelman is Jewish and of Polish-Jewish descent.

41. Upon information and belief, some of the vague, undocumented, and irregular conversations referred to by Dean Asbury were with a certain member of the College faculty. This faculty member had expressed professional jealousy toward Dr. Edelman on several occasions. This faculty member had also regularly made racist and anti-Semitic remarks. This faculty member's expressed opinions concerning Dr. Edelman were influenced by his anti-Semitic beliefs. Dean Asbury knew of this faculty member's anti-Semitic statements and beliefs. In relying on this faculty member's opinion and statements in making her determination, Dean Asbury, and through her Lynchburg College, discriminated against Dr. Edelman based on his ethnicity and religion (Jewish)

Gender Discrimination Issues

42. Dr. Edelman is a white male.

43. Dean Asbury has spoken on a number of occasions about her desire to increase the proportion of females on the College faculty.

44. During Dean Asbury's tenure as Dean, all recipients of tenure have been women, except for one Hispanic male. All non-renewals of contracts and denials of tenure have been to white male faculty members.

45. Dean Asbury attempted to remove at least two white male tenured professors during her tenure as Dean.

46. During the pendency of Dr. Edelman's tenure application, the College granted tenure to two female faculty members, both of whom taught in the Communications Department, which was an unprecedented action in the history of the college. Normally, only one faculty member from a given department is granted tenure in any given year.

47. After the decision not to grant Dr. Edelman tenure was finalized, Dean Asbury announced that only a female would be hired to fill Dr. Edelman's position.

48. A female was hired to fill Dr. Edelman's position.

49. At the time Dr. Edelman's tenure application was denied, he was 47 years old.

50. Dean Asbury told Lucy Nowell, a faculty member who was chairing a search committee to fill a position in the Computer Science Department, that she (Dean Asbury) would never hire or retain anyone in his or her early fifties.

51. Dean Asbury also told Ms. Nowell that men in their early fifties are "nothing but dead wood."

52. In 1998, the College also denied tenure to Dennis Roberts, a man in his early fifties with no indication of unsatisfactory performance, based on the recommendation of Dean Asbury and President Warren.

53. The College, through the actions of Dean Asbury and President Warren, has pursued a policy of age discrimination which was a factor in declining to offer tenure to Dr. Edelman.

54. Subsequent to his termination, Dr. Edelman has interviewed for several professorships and was close to securing a position. On information and belief, once the College was contacted for a reference to Dr. Edelman, Dr. Edelman was no longer considered to be a viable candidate for the positions to which he applied.

COUNT ONE

DISCRIMINATION IN THE COURSE OF EMPLOYMENT IN VIOLATION OF TITLE VII

55. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

56. The College, through the actions of Dean Asbury and President Warren, engaged in a pattern and practice of discrimination against Dr. Edelman on account of his gender (male), ethnicity (Jewish), religion (Jewish), and age during the course of his employment by the College. This discrimination was with respect to Dr. Edelman's terms, conditions, and privileges of employment, and constituted a violation of Title VII of the Civil Rights Act of 1964, as amended; and other civil and criminal statutes.

57. The conduct of the College was actuated by ill will, recklessness, wilful disregard for Dr. Edelman's rights, wantonness, oppressiveness, and a spirit of mischief. The College engaged in these practices with malice and with reckless indifference to Dr. Edelman's federally protected rights, within the meaning of Section 109(b) of the Civil Rights Act of 1991.

58. As a direct and proximate result of the College's actions, Dr. Edelman has suffered and continues to suffer injury including past and future loss of income and benefits of employment, including pension and retirement benefits to which he was entitled, lost career and business opportunities and advancement, litigation expenses including attorneys' fees and costs, other past pecuniary losses, future pecuniary losses, emotional pain, suffering, inconvenience, embarrassment, humiliation, exacerbation of illnesses, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and, upon information and belief, other physical injury and illness.

COUNT TWO
WRONGFUL TERMINATION OF EMPLOYMENT IN VIOLATION OF TITLE VII

59. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

60. Dr. Edelman's termination from the College was due to Dr. Edelman's gender, male; his religion, Jewish; and his age, and constituted to the culmination of the College's pattern of discrimination against Dr. Edelman.

61. Two female professors from the Communications Department were tenured the year Dr. Edelman's tenure was denied. In addition, Dr. Edelman was replaced by a female.

62. Dr. Edelman's termination violated, inter alia, important public policies underlying Title VII of the federal Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., which provides that it is an unlawful discriminatory practice to discriminate against or harass an employee on the basis of sex, religion, or ethnicity or to retaliate against an employee for opposing such discrimination or harassment.

63. The conduct of the College was actuated by ill will, recklessness, wilful disregard for Dr. Edelman's rights, wantonness, oppressiveness, and a spirit of mischief. The College engaged in these practices with malice and with reckless indifference to Dr. Edelman's federally protected rights, within the meaning of Section 109(b) of the Civil Rights Act of 1991.

64. As a direct and proximate result of this termination, Dr. Edelman has suffered and continues to suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities, litigation expense including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of illnesses, past pecuniary expenses, future pecuniary damages, mental and emotional anguish and distress, and upon information and belief, other physical injury and illness.

COUNT THREE
NEGLIGENT RETENTION

65. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

66. The College owed a duty of care to its employees, including Dr. Edelman, not to retain supervisors who had discriminatory biases which may place employees at risk of suffering from that biased or discriminatory conduct.

67. The College owed a duty of care to its employees, including Dr. Edelman, to collect, analyze, and consider in a reasonable manner background information on its supervisory employees, during the ongoing process of retaining those employees, to insure that such supervisory employees did not have unfair or discriminatory biases that would pose a threat of a hostile work environment to the College's employees.

68. The College breached this duty of care by failing to collect, analyze, or consider appropriate background material regarding Dean Asbury, while retaining Dean Asbury as a supervisory employee, and in refusing to act upon knowledge it possessed of Dean Asbury's discriminatory biases.

69. Due to its breach of these duties, the College retained Dean Asbury as a supervisory employee. Had the College performed these duties reasonably, it would not have retained Dean Asbury, particularly in a supervisory position.

70. The College's breach was a proximate cause of the incidents of discrimination, as well as a proximate cause of Dr. Edelman's wrongful discharge and breach of contract perpetrated by Dean Asbury and the College on Dr. Edelman, because this breach permitted Dean Asbury to use her supervisory authority to accomplish each act of discrimination and, ultimately, Dr. Edelman's wrongful termination.

71. As a direct and proximate result of this negligent retention, Dr. Edelman suffered and continues to suffer injury, including medical expenses, other pecuniary losses, future pecuniary losses, emotional pain, suffering, embarrassment, humiliation, inconvenience, exacerbation of illnesses, mental anguish, loss of enjoyment of life, other nonpecuniary losses, and upon information and belief, other physical injury and illness.

COUNT FOUR

BREACH OF CONTRACT

72. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

73. The College failed to follow the procedures set forth in the Handbook in evaluating Dr. Edelman's application for tenure, as set forth more specifically above. The Handbook was part of the employment contract between Dr. Edelman and Lynchburg College. The College therefore committed breaches of its contract with Dr. Edelman.

74. As a direct and proximate result of this breach of contract, Dr. Edelman has suffered and continues to suffer injury including past and future loss of income, lost benefits of employment, other past pecuniary loses, future pecuniary losses, inconvenience, other nonpecuniary losses, and other injury as set forth above.

COUNT FIVE

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

75. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

76. The College's harassing, discriminatory, and retaliatory conduct was intentional or reckless in that the College had the specific purpose of inflicting emotional distress on Dr. Edelman, fully intended its conduct, and knew or should have known that severe emotional distress would likely result.

77. The College's conduct was outrageous and intolerable in that it offends against generally accepted standards of decency and morality.

78. The College's actions constitute a single, continuing course of conduct from January 14, 1997, through the present.

79. The College's conduct was actuated by malice, spite, and ill will; was wilful and wanton; and evinced conscious disregard for the rights of Dr. Edelman.

80. As a proximate result of the College's conduct, Dr. Edelman has suffered and continues to suffer severe emotional distress.

81. As a direct and proximate result of the College's conduct, Dr. Edelman has suffered and will in the future suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities and advancement, litigation expenses including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of existing illnesses, severe mental anguish, stress, pain, suffering, medical expense, physical impact, and other physical injury and illness.

COUNT SIX

DEFAMATION

82. The allegations of the foregoing paragraphs are incorporated as if realleged herein.

83. The remarks made by the College to Dr. Edelman's prospective employers were false, made with malice, and intended to cause harm to Dr. Edelman.

84. As a direct and proximate result of the College's defamatory remarks regarding Dr. Edelman, Dr. Edelman has suffered and will in the future suffer great damages, including loss of income, loss of employee benefits, lost career and business opportunities and advancement, past pecuniary expenses, future pecuniary expenses, litigation expenses including attorneys' fees, embarrassment, humiliation, inconvenience, exacerbation of existing illnesses, severe mental anguish, stress, pain, and suffering, and, upon information and belief, other physical injury and illness.

PRAYER FOR RELIEF

WHEREFORE, SAID PREMISES BEING CONSIDERED, PLAINTIFF, DR. LEONARD EDELMAN, respectfully requests that judgment be entered in his favor, and against the defendant, and that this Court further:

(a) Order Lynchburg College to reinstate Dr. Edelman as a member of its faculty and grant him tenure retroactive to September 1, 1997.

(b) Award Dr. Edelman lost wages at the level of Associate Professor of Biology from September 1,1997 through the date of trial.

(c) Award Dr. Edelman compensatory damages in the amount of Two Million Dollars ($2,000,000);

(d) Award Dr. Edelman punitive damages in the amount of Three Hundred Fifty Thousand Dollars ($350,000);

(e) Award Dr. Edelman costs of suit, fees, and such other and further relief as may be appropriate under the circumstances;

(f) Award prejudgment and post-judgment interest on all compensatory damages awarded;

(g) Order Lynchburg College to abide by the procedures set forth in its Faculty Handbook in assessing the tenure applications submitted by its faculty; and

(h) Order Lynchburg College to undergo an assessment, approved by the Dr. Edelman and the Virginia Human Rights Council, of the College's anti—discrimination policy as it pertains to its employment relationship with its faculty.

JURY DEMAND

PLAINTIFF DEMANDS TRIAL BY JURY.

June 10, 1999

Respectfully submitted,

DR. LEONARD EDELMAN

By /s/ Kristine H. Smith
Counsel for Plaintiff

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Co-Counsel for Plaintiff
Dr. Leonard Edelman

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

ORDER

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Defendant Lynchburg College, having removed the action to this Court, filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth in the attached Memorandum Opinion, Defendant's motion to dismiss the Title VII claims is GRANTED. Because this Court lacks jurisdiction over the remaining claims, they are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order and the attached Memorandum Opinion to all parties and counsel of record.

ENTERED: [Norman K. Moon]
United States District Judge

9-20-99
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:99CV0060

DR. LEONARD EDELMAN, Plaintiff,

v.

LYNCHBURG COLLEGE, Defendant.

September 20, 1999

MEMORANDUM OPINION

JUDGE NORMAN K. MOON

Dr. Leonard Edelman filed this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, alleging that he was wrongfully denied tenure and terminated as the result of discrimination on the account of his gender, ethnicity, religion, and age. Dr. Edelman also asserts Virginia state law claims of negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The action was originally filed in the Circuit Court for the City of Lynchburg, Virginia. Lynchburg College removed the action to this Court and filed a motion to dismiss the Title VII claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Defendant's motion to dismiss also seeks to dismiss the negligent retention, intentional infliction of emotional distress, and defamation claims for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). Because Dr. Edelman failed to timely file his claim with the Equal Employment Opportunity Commission, Lynchburg College's motion to dismiss the Title VII claims is GRANTED. The remaining state law claims are REMANDED to the Circuit Court for the City of Lynchburg, Virginia.

I. BACKGROUND

Dr. Leonard Edelman, a Jewish white male, was hired by Lynchburg College (hereinafter "the College") as an Assistant Professor in 1993. Dr. Edelman entered into Lynchburg College's formal tenure evaluation process in the fall of 1996. He received tenure recommendations from the Chairman of the Biology Department and an ad hoc committee of the faculty. However, Dean Jacqueline W. Asbury recommended to President Charles Warren that tenure be denied. On May 23, 1997, President Warren informed Dr. Edelman by letter that the College's Board of Trustees had accepted his subsequent recommendation not to award Dr. Edelman tenure.

On November 14, 1997, Dr. Edelman sent a letter to the Equal Employment Opportunity Commission (hereinafter "EEOC") "request[ing] to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning [him] during January-June, 1997 culminating in the denial of [his] continued employment at the college." In this letter, which was not made under oath or affirmation, Dr. Edelman stated his belief that this case was "one of gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." The November 14 letter was followed by a letter from Dr. Edelman's counsel on November 26, 1997, which stated that "Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Counsel concluded the November 26 letter by stating that it was his "understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997." On December 3, 1997, Rosalind Hall-Smith, the EEOC Supervisor of the Charge Receipt/Technical Informational Unit, responded to the November letters by statuting that more information was needed before the matter could be pursued any further. Hall-Smith's letter concluded by stating that the EEOC would assume that Dr. Edelman did not intend to file a charge of discrimination with them if the EEOC did not hear from him within 30 days of the December 3 letter.

The EEOC conducted an interview with Dr. Edelman on March 3, 1998. On March 18, 1998, the EEOC sent Dr.

Edelman a Charge of Discrimination form which it had prepared after the March 3 interview. Dr. Edelman signed the Charge of Discrimination form and declared, under the penalty of perjury, that he believed that he was "denied tenure and terminated because of [his] sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." Dr. Edelman did not check the box on the Charge of Discrimination form beside the statement: "I want this charge filed with both the EEOC and the state or local Agency, if any." The Charge of Discrimination form stated that the earliest and latest date of discrimination was June 6, 1997. Upon the filing of the Charge of Discrimination on April 15, 1998, the EEOC designated Dr. Edelman's claims as Charge Number 122980526.

II. DISCUSSION

A *Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction*

A plaintiff has the burden of proving the existence of subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642 (4th Cir. 1999). Lynchburg College now seeks a dismissal for lack of subject matter jurisdiction due to Dr. Edelman's alleged failure to timely pursue EEOC proceedings and state enforcement proceedings under state law with the Virginia Council on Human Rights (hereinafter "VCHR"), which is charged with administering the provisions of the Virginia Human Rights Act (hereinafter "VHRA"). Va. Code § 2.1-714 *et seq.* The pertinent provision of Title VII states:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice . . . **no charge may be filed** . . . by the person aggrieved **before the expiration of sixty days after proceedings have been commenced under the State or local law,** unless such proceedings have been earlier terminated. . . If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and

> signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

41 U.S.C. § 2000e-5(c)(emphasis added). Thus, a plaintiff is required to exhaust administrative and state remedies prior to filing an action in federal court. Typically, a plaintiff litigating a claim under Title VII has 180 days from the time of the aggrieved action in which to file a complaint with the EEOC. 42 U.S.C. § 2000e-5(e). Once the EEOC issues a right-to-sue letter, the plaintiff may then file suit in federal court. If, however, the plaintiff resides in a "deferral state" within the meaning of 42 U.S.C. § 2000e-5(c), the plaintiff will have 300 days in which to commence proceedings under the appropriate state or local law. *See Davis v. North Carolina Dep't of Correction*, 48 F. 3d 134, 137-40 (4th Cir. 1995)(stating that § 2000e-5 requires plaintiff to commence proceedings under state law before the EEOC can act upon federal discrimination claims). A "deferral state" is one which has a state or local law "prohibiting the unlawful employment practice alleged" and a state agency authorized "to grant or seek relief" from the practice. *Id.*; *EEOC v. Hansa Products, Inc.*, 44 F. 2d 191, 192 n. 1 (4th Cir 1988).

Virginia is such a "deferral state" and the VCHR is a "deferral" agency within the meaning of the statute with primary responsibility for enforcement of Title VII. *Capps v. City of Lynchburg*, Civil Action No. 6:99CV0048 (W.D.Va., Lynchburg Div., 08/12/99); *Tinsley v. First Union National Bank*, 155 F. 3d 435 (4th Cir. 1998). Thus, for this Court to have subject matter jurisdiction over Dr. Edelman's complaint, he must have filed a discrimination claim with the EEOC and the VCHR. The EEOC Charge of Discrimination, which was sworn and signed by Dr. Edelman, stated that the last date on which he was discriminated against was June 6, 1997. Thus, the last date for filing, by Dr. Edelman's own calculations beginning with June 6, 1997 as the latest date of discrimination, would be April 2, 1998. Because this Charge of Discrimination was not filed with any agency until April 15, 1998, Dr.

Edelman failed to file within the 300 days allowed in which to commence proceedings.

Dr. Edelman argues that he did timely file his complaint because the November 1997 letters were written and sent within the 300 day time limit. He further argues that the April 15, 1998 Charge of Discrimination relates back to the November 14, 1997 letter and that his filing date should, therefore, be considered as November 14, 1997. While the Code of Federal Regulations provides that "[a] charge may be amended to cure technical defects or omissions . . . ", the problem with the plaintiff's argument is that the November 14, 1997 letter did not constitute a charge to which the April 15, 1998 charge could relate.

Title VII requires charges to be made "under oath or affirmation." 42 U.S.C. § 2000e-5(b). Dr. Edelman's November 14, 1997 letter was not made under oath or affirmation. Title VII requires charges to contain "such information and be in such form as the Commission requires." *Id.* The EEOC responded to the November letters from Dr. Edelman and his attorney by stating that the information provided was not sufficient for the EEOC to continue investigating Dr. Edelman's claim. Title VII states that "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days." *Id.* The EEOC did not serve notice of any discrimination charge on Lynchburg College within ten days of the November letters. In fact, Dr. Edelman's counsel specifically stated in his November 26, 1997 letter that Dr. Edelman wanted an interview with an EEOC investigator before any final charging documents were forwarded to Lynchburg College. The Court further observes that no charge number was assigned to the November 14, 1997 letter, that it was not sent as a charge of discrimination to the VCHR, and that the April 15, 1998 Charge of Discrimination does not even reference it. Thus, the Court agrees with the defendant's assertion that neither Dr. Edelman nor the EEOC proceeded as if the November 1997 letter did, or were intended to,

commence proceedings.[1] Accordingly, the November 14, 1997 letter did not commence proceeding. As a result, there is no charge for the April 15, 1998 charge to relate back. Thus, the filing date is April 15, 1998, which is beyond the 300 days allowed to timely commence proceedings.

Dr. Edelman claims that even if he did not timely commence proceedings, he is entitled to equitable tolling of the filing period. In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed. 2d 234 (1982), the United States Supreme Court held that "filing a charge of discrimination with the EEOC is . . . a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling." Dr. Edelman, however, fails to establish that there are any reasonable grounds in this situation to warrant an equitable tolling of the filing requirements.

Although Dr. Edelman argues that he is entitled to equitable tolling because of the EEOC's delay in responding to his letter, the EEOC interviewed him and then mailed the prepared Charge of Discrimination form to him on March 18, 1998, within the time allowed to commence preceding. The letter attached to the prepared Charge of Discrimination form invited Dr. Edelman to make any necessary corrections. All that Dr. Edelman had to do at that point was to review the form, sign it, check the box that would have simultaneously filed the charge with the VCHR, and mail the charge back to the EEOC in the enclosed postage paid envelope. Because Dr. Edelman has not shown that there was an unreasonable delay on the part of the EEOC from the time that he initially contacted them six months after the last date of discrimination to the time that he received the Charge of Discrimination in the mail, this Court does not conclude that the period of time that lapsed before receiving the prepared Charge of Discrimination warrants an equitable tolling of the time requirements.

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[1] This Court does observe that Dr. Edelman's counsel stated in his November 26, 1997 letter that he assumed that the filing date would be considered as of November 14, 1997. This Court, however, is aware of no authority that would allow a declaration of a party (or a party's counsel) of what should be considered a fling date to circumvent the requirements of Title VII. A filing date is established when proceedings are commenced as contemplated by the provisions of Title VII.

Similarly, the Court also disagrees with Dr,[sic] Edelman's argument that equitable tolling should be granted because Lynchburg College was not unduly prejudiced by his failure to commence proceedings in a timely manner. This argument fails to observe the fact that "[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 152, 104 S.Ct. 1723, 1726 (1984). Dr. Edelman's situation is not one where the delays of anyone besides himself hindered his ability to timely commence proceedings. The EEOC did not lead him to believe that he had done everything required to commence proceedings. Following the November 1997 letters, the EEOC advised Dr. Edelman that the November 1997 letters were not sufficient and that additional information was needed before the matter could be pursued. Similarly, Dr. Edelman's situation is not one where Lynchburg College engaged in any type of misconduct that would have lulled him into inaction. Thus, there is no independent factor that would warrant equitable tolling. This Court may not grant equitable tolling just because there has not been a showing that Lynchburg College would be prejudiced by extending the time in which Dr. Edelman could have commenced proceedings. As stated by the United States Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants. . . . [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Id.

The defendant's motion to dismiss the Title VII claim for lack of subject matter jurisdiction is GRANTED.

B. *Defendant's Motion to Dismiss Other Pending Motions*

Finally, in response to the defendant's 12(b)(6) motion to dismiss the state law claims for failure to state a claim upon which relief can be granted, these claims are REMANDED to the Circuit Court for the City of Lynchburg.

The Clerk of the Court is directed to send a copy of this Order to all parties and counsel of record.

ENTERED: /s/ Norman K. Moon
U.S. District Judge

9-20-99
Date

United States Court of Appeals,
Fourth Circuit.

Leonard EDELMAN,
Plaintiff-Appellant,

v.

LYNCHBURG COLLEGE,
Defendant-Appellee.

No. 99-2408

Argued: June 8, 2000
Decided: Oct. 2, 2000

Affirmed and remanded.

Luttig, Circuit Judge, filed concurring opinion.

Before WILKINS and LUTTIG, Circuit Judges, and BEEZER, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

BEEZER, Senior Circuit Judge:

Leonard Edelman appeals the district court's dismissal of his employment discrimination action for lack of subject matter jurisdiction. This case presents an issue of first impression in this circuit: whether 29 C.F.R. § 1601.12(b), a regulation promulgated by the Equal Employment Opportunity Commission ("EEOC"), conflicts with the statutory requirements of Title VII of the Civil Rights Act, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1), to the extent that the regulation permits a charge of discrimination to be verified after the expiration of the applicable limitations period. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that, so applied, the EEOC regulation is contrary to the plain language of the statute, we affirm the dismissal of

Edelman's action on the grounds that he failed to file a timely charge of discrimination.

I

Edelman, a white Polish-Jewish male biology professor, was denied tenure by Lynchburg College on June 6, 1997. On November 14, 1997, Edelman sent a letter to the EEOC alleging that he had been subject to "gender-based employment discrimination, exacerbated by discrimination on the basis of [his] family's national origin and religion." According to Edelman, Jacqueline Asbury, the Dean of the College, opposed his tenure because she wanted to improve the percentage of tenured women on the faculty. Edelman claims that Asbury ignored the uniform support of his department chairman, an ad hoc faculty committee, and the Faculty Personnel Committee. At the conclusion of his letter, Edelman wrote, "I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case [.]" Edelman's letter was received by the EEOC on November 18, 1997.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC that stated:

> Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.
>
> * * *
>
> Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Shortly thereafter, the EEOC sent a letter to Edelman advising him that it needed additional information in order to investigate his case. The EEOC's letter urged Edelman to set up an interview "as soon as possible because a charge of

discrimination must be filed within the time limits imposed by law[.]"

On February 17, 1998, the EEOC sent Edelman an appointment notice advising him that his interview was scheduled for March 3, 1998. The interview was conducted as scheduled. On March 18, 1998, the EEOC mailed a draft charge to Edelman for his signature. Edelman's verified charge of discrimination was filed with the EEOC on April 15, 1998--313 days after the date of alleged discrimination.

The EEOC did not assign a number to Edelman's case until after it received his verified charge. Approximately one week later, the EEOC forwarded the charge to both Lynchburg College and the Virginia Council of Human Rights ("VCHR"), the state agency authorized to seek relief from unlawful employment practices. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. Lynchburg College removed the action to federal court after Edelman amended his complaint to assert a cause of action under Title VII, 42 U.S.C. §§ 2000e through 2000e-17. Lynchburg College then moved for dismissal under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Because the district court concluded that Edelman failed to timely file his charge of discrimination, it granted Lynchburg College's motion, dismissed the Title VII claim, and remanded Edelman's remaining claims to state court. Edelman timely appeals.

II

We review de novo a district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Evans v. B.F. Perkins Co*, 166 F.3d 642, 647 (4th Cir.1999).

In order to assert a Title VII claim in federal court, a plaintiff must first exhaust his administrative remedies by filing a charge of discrimination with the EEOC. *See Taylor v. Virginia Union Univ.*, 193 F.3d 219, 239 (4th Cir.1999). Title VII establishes two potential limitations periods within which the discrimination charge must be filed with the EEOC. *See* 42

U.S.C. § 2000e-5(e)(1); *see also Tinsley v. First Union National Bank*, 155 F.3d 435, 439 (4th Cir.1998). The basic limitations period is 180 days after the alleged unlawful employment practice. *See* 42 U.S.C. § 2000e-5(e)(1). The limitations period is extended to 300 days, however, in "deferral states." *See id.* § 2000e-5(e)(1).

A "deferral state" is one which has a state law "prohibiting the unlawful employment practice alleged" and a state or local agency authorized "to grant or seek relief" from the practice. *See id.* 2000e-5(c). Virginia is a "deferral state." *See Tinsely*, 155 F.3d at 440. Accordingly, the 300-day limitations period applies to Edelman's Title VII claim.

III

Edelman argues that the district court erred in dismissing his Title VII claim because his April 15, 1998 charge of discrimination related back to his November 14, 1997 letter and was thus timely filed within 300 days of June 6, 1997, the date of the alleged discrimination. Title VII states that charges of discrimination "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The relevant EEOC regulation states that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Edelman's letter was mailed to the EEOC within 300 days and sufficiently identified the parties and the alleged discriminatory action. However, the letter was not sworn to under oath or affirmation. Nevertheless, Edelman relies on the second sentence of the regulation, which provides that "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ... will relate back to the date the charge was first received." *Id.*

The parties agree that if the regulation is applied to Edelman's discrimination charge, the sworn-but-untimely charge relates back to his unsworn-but-timely letter and is thus timely filed. The parties disagree, however, as to whether the regulation may be so applied.

In order to answer this question, we must carefully consider the relationship between the regulation (Section 1601.12(b)) and the statute (Title VII, specifically 42 U.S.C. § 2000e-5(b) and 2000e-5(e)(1)). We begin with the framework established by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984):

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), the Court considered the Chevron framework in the specific context of Title VII. The Court made clear the standard by which we are guided:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Id. at 340 (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989)).

Step one of the *Chevron* analysis, as confirmed by *Robinson*, requires us to determine whether Congress has expressed its intent with respect to the issue at hand. In undertaking this analysis, we are mindful that "agency power is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 161 (4th Cir.1998) (quoting *Ernst &*

Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976)) (internal quotation marks and other citations omitted).

The precise question at issue in this case is whether verification must occur within the statutory limitations period. "[T]he first place where we must look to see if Congress has spoken to the issue with which we are concerned and whether Congressional intent in that regard is clear is on the face of the statute." *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir.1995). As we have earlier stated, "[s]tatutory construction must begin with the language of the statute." *Id.*

We conclude that Congress has unambiguously spoken on this issue. As noted above, the language of the statute itself requires that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). The plain meaning of this language compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge.

In defining a charge, Congress chose to limit the EEOC's authority. While Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly establishes the time period within which a charge must be filed. *See id.* § 2000e-5(e)(1).

Because a charge requires verification, *see id.* § 2000e-5(b), and because a charge must be filed within the limitations period, *see id.* § 2000e-5(e)(1), it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII.

Having concluded that application of the EEOC's regulation in this case contravenes Congress's intent, as expressed through the plain language of the statute, we need not proceed further. Step two of the *Chevron* analysis does not come into play, and we do not apply the EEOC regulation. *See*

Chevron, 467 U.S. at 843 n. 9, 104 S.Ct. 2778 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Brown & Williamson*, 153 F.3d at 161 ("It is only if the intent of Congress is ambiguous that we defer to a permissible interpretation by the agency.").

The Supreme Court has long adhered to the rule that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n. 9. *See, e.g., FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) ("[Courts] must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."); *NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions."); *Webster v. Luther*, 163 U.S. 331, 342 (1896) ("But this court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute").

Likewise, this circuit has refused to defer to agency interpretations that are contrary to the statute at issue. *See, e.g., In re Apex Express Corp.*, 190 F.3d 624, 641 (4th Cir.1999) ("Here, there is no ambiguity in the text of the statute to justify the [agency's] position or a turn to legislative history."); *Cabell Huntington Hosp. v. Shalala*, 101 F.3d 984, 988 (4th Cir.1996) ("We cannot endorse the Secretary's reading. To do so, we would have to violate both a clear canon of statutory construction, and the plain meaning of the two terms.").

In keeping with the tradition that requires us to protect the will of Congress, we hold that the regulation, 29 C.F.R. § 1601.12(b), may not be applied to allow Edelman's untimely charge to relate back to his November 14, 1997 letter.

IV

Edelman argues that our decision today conflicts with our earlier discussions of the regulation in *Tinsely v. First Union National Bank*, 155 F.3d 435 (4th Cir.1998), and *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir.1994). We disagree.

In *Balazs*, the earlier of the two cases, we addressed the regulation in the context of a plaintiff's attempt to verify his allegations of discrimination almost four months after the EEOC issued plaintiff a right-to-sue letter and terminated its processing of his case. *See Balazs*, 32 F.3d at 157. The plaintiff made two arguments on appeal: first, that a charge of discrimination did not require verification; and, second, that an unverified charge may be cured by amendment. *See id.* at 156. We rejected outright the plaintiff's first argument, concluding, as we conclude today, that "a sworn charge of discrimination with the EEOC is a mandatory prerequisite to the validity of the charge." *Id.*.

With respect to the plaintiff's second argument in *Balazs*, although we noted that "[i]t has been held that this regulation is valid and is not contrary to the statute requiring verification of charges," *id.* at 157 (citing *Peterson v. City of Wichita*, 888 F.2d 1307, 1308-09 (10th Cir.1989)), we refused to apply the regulation under the facts of the case, *see id.* We expressed our concern that "[c]arried to its logical conclusion, under the EEOC's interpretation of its regulation it would never be too late to verify a charge[.]" *Id.* Thus, we determined that "a reasonable construction" of the regulation would "simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC's files [.]" *Id.* Here, we similarly conclude that a reasonable construction must be imposed on the regulation, one which does not allow relation-back of the verification requirement beyond the time limitation prescribed by Congress.

We briefly mentioned both the regulation and *Balazs* in a footnote in *Tinsley*:

> The district court also rejected Tinsley's claim that her untimely formal charge amended and related back to her timely-but-unsworn letter. In so ruling, the district court inexplicably ignored the applicable EEOC

> regulation, 29 C.F.R. § 1601.12(b), which explicitly allows such an amendment. What is more, the district court ignored the recent conclusion of this Circuit approving the very use of the regulation that Tinsley, joined by the EEOC, urges: allowing her verified claim to amend and relate back to the date her unverified claim was filed.

Tinsley, 155 F.3d at 439 n. 2 (citing *Balazs*). We noted, however, that in light of our conclusion that Tinsley's verified charge was filed within the applicable limitations period, which we held to be 300 days rather than 180, there was no need to address the regulation. *See id.* ("Because we hold that the appropriate statute of limitations period was 300 days, we need not resolve any of these other questions."). Thus, the most that can be said about our discussion of the regulation in Tinsley is that it is dictum. Moreover, contrary to Edelman's characterization, the facts of this case are materially different from those of Tinsley. Tinsley verified his allegations of discrimination within the statutory time period, whereas Edelman did not.

V

Although our decision today is consistent with our prior discussions of the regulation, we are mindful that our analysis conflicts with that of several other circuits.

In *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F.2d 321 (7th Cir.1991), the Seventh Circuit reversed a decision of the district court dismissing the plaintiff's Title VII action as untimely. *See id. at* 322. The *Philbin* court held that a timely filed Intake Questionnaire, which is verified after the

limitations period, may be sufficient to constitute a charge.* *See id. at* 323.

The court relied on two factors in reaching its decision. First, the court stated that "Title VII is remedial legislation which must be construed liberally." *Id.* Citing its previous decision in *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir.1968), in which it stated that the verification requirement was "directory and technical rather than mandatory and substantive," *Choate*, 402 F.2d at 359, the *Philbin* court concluded that "[i]n keeping with the broad purposes of the act, the omission of technical requirements which are later fulfilled should not affect the timeliness or validity of the charge." *Philbin*, 929 F.2d at 324.

In contrast to the Seventh Circuit, we have previously held that the oath requirement contained in Title VII "is cast in mandatory terms." *Equal Employment Opportunity Comm'n v. Appalachian Power Co.*, 568 F.2d 354, 355 (4th Cir.1978). We also noted then, as we confirm now, that we "see no reason to ignore the plain language that Congress has enacted." *Id.*; *accord Hamel v. Prudential Ins. Co.*, 640 F.Supp. 103, 105 (D.Mass.1986) ("Although an Intake Questionnaire is signed, it is not signed under oath. Any suggestion that this distinction is formalistic tends to ignore the significance of a perjury conviction.").

The second factor relied upon by the *Philbin* court was "the deference accorded EEOC regulations." *Philbin*, 929 F.2d at 324. In applying the *Chevron* analysis, the court failed to give sufficient weight to the plain language of the statute, focusing instead on whether the EEOC's regulation represented a reasonable interpretation of the statute. The court did note,

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* The court did not go so far as to say that a subsequently-verified Intake Questionnaire will always constitute a charge. *See Philbin*, 929 F.2d at 324. Instead, the court considered the EEOC's treatment of the questionnaire. Specifically, the court recognized that the EEOC had not only assigned a charge number to the questionnaire within the 300-day time period, but also notified Philbin's employer within the same period. *See id.* In Edelman's case, the EEOC neither assigned a charge number nor notified Lynchburg College of Edelman's claim within the 300-day limitations period.

however, that "[w]hile the statute does require that a complainant verify a charge, the statute does not require that the verification take place prior to the expiration of the 300-day time period." *Id.*

As discussed in Section III above, we read the plain language of the statute differently. Moreover, while we recognize the remedial nature of Title VII, we see no reason to distort Congress's mandate that charges be timely verified in order to make room for the EEOC's regulation. Cf. *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 150 (1984) (holding that there is "no satisfactory basis for giving Title VII actions a special status under the [Federal] Rules of Civil Procedure").

Finally, we note that the Seventh Circuit is not the only other circuit to have addressed the conflict between the EEOC regulation and the statutory provisions of Title VII. Other circuits have approved the application of the regulation to permit the relation-back of charges that were verified after the limitations period. *See Peterson v. City of Wichita*, 888 F.2d 1307, 1308 (10th Cir.1989) (rejecting the district court's conclusion that regulation was contrary to statute and thus beyond EEOC's power to promulgate); *Casavantes v. California State Univ.*, 732 F.2d 1441, 1442-43 (9th Cir.1984) (noting that its position is "consistent with the recent trend in Title VII jurisprudence which recognizes the importance of nontechnical interpretations of the procedural requirements inherent in the processing of discrimination claims"; condemning contrary position as "overly formalistic"); *Price v. Southwestern Bell Tel. Co.*, 687 F.2d 74 (5th Cir.1982) (reversing summary judgment in favor of employer because factual issues remained as to whether form completed by plaintiff constituted "charge" and as to whether EEOC waived verification requirement). But *see Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir.1998) (holding that Intake Questionnaire does not constitute a "charge" because it is not verified and that regulation only allows an amendment to relate back to the date a charge is first received).

We disagree with these decisions, in short, because we believe that they improperly substitute policy justifications for clear statutory language. *See* Kenneth Culp Davis & Richard

J. Pierce, Jr., *Administrative Law Treatise* §§ 3.2, 3.3 (3rd ed.1994) (discussing *Chevron*'s attempt to curtail judicial policy-making).

V

Although we conclude that Edelman failed to timely file a charge of discrimination, we recognize that this failure does not deprive the court of subject matter jurisdiction. *See Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) ("We hold that filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling."). But *see Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 137 (4th Cir.1995) (discussing Title VII's exhaustion requirement in jurisdictional terms).

Before we affirm the dismissal of Edelman's Title VII claim, we consider whether the facts of this case warrant equitable tolling of the limitations period. Edelman was represented by counsel at all stages of the administrative process. In fact, his initial letter to the EEOC referenced his attorneys by name. Despite the fact that Edelman attempts to attribute significant delay to the EEOC's processing of his complaint, he waited more than five months after the alleged discrimination before even contacting the agency. Moreover, the EEOC mailed the draft charge to him before the expiration of the limitations period. Had he promptly signed and returned the proposed draft, which included a form of oath or affirmation, his charge would have been timely filed.

We hold that Edelman is not entitled to equitable tolling of the limitations period. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("[T]he principles of equitable tolling ... do not extend to what is at best a garden variety claim of excusable neglect.").

VII

We believe this case is best summed up in the words of the Supreme Court:

> Procedural requirements established by Congress for gaining access to the federal courts are not to be

> disregarded by courts out of a vague sympathy for particular litigants.... [I]n the long run, experience teaches that strict adherence to the procedural requirements specified *512 by the legislature is the best guarantee of evenhanded administration of the law.

Baldwin County Welcome Ctr., 466 U.S. at 152, 104 S.Ct. 1723.

The judgment of the district court dismissing Edelman's action is affirmed, but on remand the district court should take proper action to indicate that the dismissal is for failure to exhaust administrative remedies rather than for lack of subject matter jurisdiction.

AFFIRMED AND REMANDED.

LUTTIG, Circuit Judge, concurring:

I would decide this case on the narrow ground that Edelman's second filing is ineligible for relation back because (1) Edelman characterized his initial filing as a *request* for a charge rather than as a charge; (2) the EEOC did not even treat Edelman's original filing as a charge; (3) the EEOC never served a copy of the letter on Lynchburg College; and (4) the second sworn letter, which allegedly amended the first letter, even alleges different discriminatory conduct than that charged in the original letter.

I am sufficiently uncomfortable with the broader ground for decision set forth in the majority opinion, that verification may never relate back after 180 days from the date of the alleged discriminatory action, that I am unable to concur in the opinion for the court. As to this issue, we are not confronted with a single statute stating either by terms or in effect that "a verified charge must be filed within 180 days of a discriminatory action." Were we confronted with a single statute worded in this way, then the plain meaning interpretation advanced in the opinion for the court would, I think, be unassailable. Instead, we are presented with two statutes, the first providing that a charge shall be filed within 180 days of the unlawful employment practice, and the second providing that charges shall be in writing and include an oath or affirmation.

Although I confess some uncertainty as to this, it seems to me that, between these two statutes, there is not *necessarily* the nexus required in order to sustain the plain meaning interpretation advanced in the opinion. That is to say, it seems to me *at least plausible* to read the first statute to require simply that a charge be filed within 180 days, and the second as freestanding of the first, and simply to require that, before a charge is finalized, all of the allegations and information required by the EEOC be provided and verified. Of course, if the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the 180 days, and relation back would be available by regulation.

Apart from what I believe is its inherent structural logic, this interpretation is plausible because there is no statutory

definition of "charge," contrary to the implicit premise of the majority's opinion. There is no statutory definition that provides that, in order to constitute a "charge," an allegation must be verified. Thus, the "charge" that must be filed within 180 days need not--at least need not by definition--be an allegation that is verified or that includes all the information that eventually must be provided before it is sufficiently complete to require notice to the employer. Insofar as the statute informs us, the "charge" that must be filed within 180 days can be merely an allegation of discrimination; it need not be verified.

As precisely as I can state it--and I readily concede that the point is conceptually elusive--the majority's interpretation seems to me actually to depend entirely upon reading the two statutes as if they were one. And I fear that it is *only* through reading the two as one that the nexus necessary to the majority's interpretation is supplied; in other words, unless the two statutes are read as one, I believe that it is impossible to say, with the certainty necessary to abrogate the agency's contrary interpretation, that a charge must be filed *and* verified within 180 days of the alleged discriminatory action.

I do not believe that the alternative interpretation I suggest is the only interpretation of the two statutes, by any means. Indeed, I do not even believe that it is the better interpretation; in fact, I believe that the one adopted by the majority is the better. But I do believe that this alternative interpretation of the agency is a plausible one. And, of course, being such, we are bound to give deference to that administrative interpretation.

For these reasons, I concur only in the judgment of the court.

FACSIMILE TRANSMISSION COVER SHEET

DATE: Nov. 14, 1997

SENT TO: Rosalind Hall-Smith

AT: The Equal Employment Opportunity Commission

3600 West Broad Street Richmond, Virginia 23230

FAX NUMBER: (804) 278-4660

PAGES INCLUDED IN THIS TRANSMISSION: This sheet and 5 others.

FROM: Dr. Leonard Edelman

Lynchburg College

Lynchburg, Virginia 24501

MESSAGE:

Enclosed please find my request to file a charge of employment discrimination against Lynchburg College.

November 14th 1997

To: Rosalind Hall-Smith
The Equal Employment Opportunity Commission
Room 229
3600 West Broad Street
Richmond, Virginia 23230

Via: FAX: (804) 278-4660

From: Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
Lynchburg, VA 24501

Re: Filing a charge of employment discrimination against Lynchburg College, Lynchburg, VA 24501

Dear Madam,

Please accept this letter as my request to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning me during January - June, 1997 culminating in the denial of my continued employment at the college. I call upon the EEOC to investigate the personnel decision-making process during the past four years at Lynchburg College which has subjected many people to illegal discrimination and created an unjust and unfair employment situation.

I came to Lynchburg College during August, 1993 as a tenure-track assistant professor in the Biology Department. My appointment included 2 years service credit for my previous teaching position. That meant that following a 4 year 'probationary and evaluation period' I would be eligible for

tenure and promotion to associate professor (i.e. during the Fall, 1996 semester).

During my 'probationary and evaluation period' I received the highest praise, commendations, evaluations and recommendations both verbally and in writing from my students, faculty colleagues, staff members and administrators (in particular the Dean of the College, Jacqueline Asbury). Each year I was reappointed with very gratifying written recommendations from the Dean of the College. I was awarded a merit pay increase for excellence in teaching. My classroom teaching and student commentary about my teaching appeared in a promotional video produced by the college to recruit new students. My teaching and research work at Lynchburg College has consistently received critical acclaim from all sources at the school. My students have received top academic awards from the school and gone on to medical and graduate schools upon graduation. The Dean paid for my travel to several prestigious educational conferences. I was asked to speak to a gathering of hundreds of parents of prospective students. Last fall I was chosen by the Dean to be the faculty representative to the Board of Trustees meeting. I have been instrumental in the establishment of undergraduate research at Lynchburg College. I was recently awarded the top research grant from the college for me and one of my students to continue our laboratory work during the summer months of 1997. *Never once* during this probationary and evaluation period did I receive a poor evaluation nor a less than exemplary recommendation at Lynchburg College. *Never once*, either verbally or in writing or in any manner, was I criticized nor directed to take corrective action about any portion of my work.

The last phase of my tenure and promotion process began during the Fall, 1996 semester with final reviews, interviews and recommendations first by the chair of the Biology Department, then by an *ad hoc* faculty committee, and then by

the Faculty Personnel Committee. I received the highest recommendations and unanimous approval from all these persons and committees.

Next in the process came the recommendation from the Dean of the College, Jacqueline Asbury. It arrived at my office on January 16th 1997. *For the first time* during my service at Lynchburg College I suddenly received a negative recommendation. She denied my tenure and promotion for her stated reasons of ineffective teaching and unproductive scholarly work. Needless to say this was a shocking, inexplicable, and totally unexpected surprise to me, all my colleagues at Lynchburg College and my family. I wrote to and met with Dean Asbury as did several of my colleagues in an attempt to make sense out of her very unexpected decision. The resulting conversations and subsequent written letters from her were at best ambiguous, at worst arrogant and unintelligible. They only served to make her sudden negative decision even more bewildering to all of us and her unsubstantiated allegations even more muddled. Nevertheless she persisted in her denial of my tenure and promotion.

I filed a grievance with the Faculty Grievance Committee based on multiple procedural violations by the Dean and the President of the College. The committee conducted an investigation which included comprehensive reviews of four years of written materials and extensive interviews with all the people involved in the process. Based upon their findings the committee voted unanimously and convincingly in my favor. Their assessment was that not only were there multiple procedural violations committed by the President and the Dean, but at some points my academic freedom had certainly been infringed upon. They forwarded their full report to the President of the College, Charles Warren, including several very reasonable recommendations for rectifying the situation. In his reply the President rejected all such recommendations,

but made a proposal of his own the implementation of which was contingent on my acceptance. Despite some reservations I accepted his proposal. He then wrote back rejecting my acceptance of his proposal!

Soon after that unusual sequence of events, the President and then the Board of Trustees of the College informed me of their decisions to support the Dean's decision and deny my tenure and promotion. The final letter from the President arrived at my home by certified mail on June 6th 1997 informing me of the date of my last day of employment at the college.

The suddenness and totally unexpected nature of this decision, the dramatic disparity and inconsistency with four years (i.e. my stated probationary period) of only very positive evaluations and exemplary recommendations, and the unsubstantiated and ambiguous allegations initially posed by the Dean are at best puzzling, and at worst onerous. I believe some answers can be found with a look back to the somewhat distant past and to the recent past at Lynchburg College.

Dean Asbury has been at Lynchburg College since 1960. For a long time she was a member of the faculty and the lone female member of her department. She has described the difficulties she endured under those circumstances, the deep-seated feelings resulting from her lack of power to address certain situations, and her agenda which grew out of those times. As Dean during the past four years she has been outspoken about her plans to bring many more women to Lynchburg College and reduce the number of male faculty. My review of her record of personnel decisions since becoming Dean four years ago has shown me that all non-renewal of contracts and adverse employment actions have occurred exclusively to white males at the college, while all positive tenure and promotion decisions have occurred to only women

and one hispanic male. She has hired many new administrators, all women to the best of my knowledge. She has unsuccessfully attempted to remove at least two tenured professors, both white males. At the same time my tenure and promotion were being denied it was being granted to two women both in the same department. It is my understanding that such a decision involving two members of the same department at the same time is highly unusual.

I believe my case is one of gender-based employment discrimination, exacerbated by discrimination on the basis of my family's national origin and religion. I believe this will be verified in a formal examination of the official records of personnel decisions by Dean Asbury and the current administration during the past four years, and in interviews with members of the college community who have known Dean Asbury over the years. In addition, although not readily apparent from the written documentation, it is also clear that my national origin and religious heritage have apparently played a role in the sudden and unsubstantiated judgements of the college administration. This would explain why (e.g.) the Dean has refused to disclose the evidence or reasons for her judgement which runs diametrically opposed to the overwhelmingly unanimous judgements of a great number of reasonable and well-educated people. She has only offered the assertions of unnamed sources in unnamed places at undetermined times under unknown circumstances. How unfortunate that a person like myself, who is a first generation American of Polish-Jewish descent, can perform at the level I have performed and achieve far beyond all the expectations that were demanded of me, to then be subjected to such bigotry and capriciousness. My family journeyed a long way to America to be free of such fears. Therefore, I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of

Trustees) and I call upon the EEOC to investigate this case in an attempt to rectify this unjust and unfair situation before any more people are subjected to this illegal discrimination.

Thank you for your attention and consideration in this matter. You should be hearing from my attorneys Edward Hogshire and Kristine Smith whose addresses, phone and fax numbers are shown below.

Sincerely,

/s/ Leonard Edelman

Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
(804) 544-8367 (office)
(804) 544-8499 (fax)
edelman@hobbs1.lynchburg.edu
(804) 525-6627 (home)

cc:

Edward L. Hogshire
Attorney-at-Law
Buck, Hogshire & Tereskerz, Ltd.
211 East High Street
Charlottesville, VA 22902
(804) 977-7977 (phone)
(804) 977-4847 (fax)

Kristine Smith
Attorney-at-Law
Edmunds and Williams
800 Main Street
Lynchburg, Virginia 24505
(804) 846-9000 (phone)
(804) 846-0337 (fax)

BUCK HOGSHIRE & TERESKERZ, LTD.
Attorneys at Law

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Edward L. Hogshire
Terry L. Tereskerz
Of Counsel:
Patricia M. Tereskerz

211 East High Street
Charlottesville, VA 22902
Telephone: (804) 977-7977
Facsimile: (804) 977-4847

November 26, 1997

Ms. Rosalind Hall-Smith
Intake Supervisor,
Richmond Area Office
Equal Opportunity Commission
3600 Broad Street
Richmond, VA 23230

RE: Leonard Edelman/Lynchburg College
(sent via facsimile no. 804-278-4660)

Dear Ms. Hall-Smith:

This to follow-up on our telephone conversation regarding the above-named matter. This firm, along with the firm of Edmunds & Williams in Lynchburg, represents Professor Edelman, who filed his complaint of discrimination against Lynchburg College on November 14, 1997. Professor Edelman would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college. It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.

Finally, please have the investigator contact this office to schedule the interview at a mutually convenient time.

Thanking you for your assistance, I am

Yours sincerely,

/s/ Edward L. Hogshire

Edward L. Hogshire

cc: Prof. Leonard Edelman
Kristine Smith, Esq.

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Board Street
Room 229
Richmond, VA 23230
PH: (804) 278-4651
TDD: (804) 278-4654
FAX: (804) 278-4660

December 3, 1997

Leonard Edelman
Assistant Professor
Biology Department
Lynchburg College
Lynchburg, VA 24502

RE: Lynchburg College

Dear Mr. Edelman:

Your letter concerning allegations of employment discrimination has been received. The information you provided is not sufficient for us to continue investigating your case. Additional information is needed before we can pursue this matter. Our experience is that an interview is the best way to obtain the needed information. Please call this office immediately. If you are unable to come to the office, the interview can be conducted by telephone. Whether in person or by telephone, the interview can be expected to take at least an hour.

To arrange an interview, please call during our office hours, which are 8:30 AM to 5:00 PM, Monday through Friday. Our telephone number is (804) 278-4651. If you are outside the local calling area, you may call our office toll-free number 1-800-669-4000.

I urge you to contact us as soon as possible because a charge of discrimination must be filed within the time limits imposed by law, within 180 days of the alleged discrimination in the state of Virginia. When you call or visit, please mention that you are responding to this letter.

PLEASE ASK TO SPEAK WITH AN OFFICER OF THE DAY IN ORDER THAT YOUR INQUIRY CAN BE SCREENED AND AN APPOINTMENT CAN BE SCHEDULED IF NECESSARY.

IF WE HAVE NOT HEARD FROM YOU AT ALL WITHIN 30 DAYS OF THIS LETTER, WE WILL ASSUME THAT YOU DID NOT INTEND TO FILE A CHARGE OF DISCRIMINATION WITH US.

Sincerely,

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
CR/TIU Supervisor

RHS/hs

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Board Street
Room 229
Richmond, VA 23230
PH: (804) 278-4651
TDD: (804) 278-4654
FAX: (804) 278-4660

DATE OF NOTICE: February 17, 1998

NAME: Leonard Edelman
Assistant Professor, Biology Department,
Lynchburg College
Lynchburg, VA 24502

EEOC APPOINTMENT NOTICE

Office

Your interview is scheduled as follows:

DAY: Tuesday DATE: March 3, 1998 TIME: 2:00 pm

The interview will probably take two hours. If you are scheduled for an interview in our office, please bring all documents, letters and/or notes as well as names, addresses and telephone numbers of witnesses which you believe may support your allegations. If you are scheduled for a telephone interview, please have these relevant documents/information available for reference.

Please be advised you will be given a 15 minutes grace period after the time of your scheduled appointment. If you are not present or cannot be reached at the telephone number given to us, you will lose your appointment. If you cannot keep your appointment or know that you will be late, please call the undersigned at (804) 278-4651 or 1-800-669-4000. Advise us as soon as possible if you are unable to keep your appointment.

Reminder: You have 180 days from the date of the alleged violation to file a charge with our office, unless you work for the Commonwealth of Virginia, in which case you have 180 days.

Sincerely,

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
CRTIU Supervisor

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
3600 West Board Street, Rm 229
Richmond, VA 23230
(804) 278-4652
Fax: (804) 278-4660

March 18, 1998

Dr. Leonard Edelman
100 Prestview Drive
Forest, VA 24551

Re: Edelman v. Lynchburg College

Dear Dr. Edelman:

This is to acknowledge your charge of employment discrimination against the above named Respondent.

The attached EEOC Form 5, Charge of Discrimination, was drafted as a result of information provided. To facilitate proper handling of this action by the Commission, you should:

1. Review the enclosed charge forms.
2. Sign the charge in the bottom left hand block. If this charge is more than one page long, all pages
3. Return the signed charges to this office in the enclosed postage paid envelope.
4. Should there be corrections or additions that you wish to make on the charge, make the correction above the error and then initial the change.

Also enclosed is an EEOC Form 133a, "Affidavit", which has been prepared from the information which you supplied. Please

initial each page and any corrections. Your signature is required on the final page. Your signature makes the document your sworn statement. This must be returned with your charge.

Should you not return this charge to this office, your charge will not be processed. Please call me if you have any questions.

Sincerely,

Regina C. McPhie
Investigator

dtm

CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974; See Privacy Act Statement before completing this form

AGENCY	CHARGE NUMBER
☐ FEPA	122980526
☒ EEOC	

_____ and EEOC
State or local Agency, if any

NAME *(Indicate Mr. Ms. Mrs.)* Dr. Leonard Edelman
HOME TELEPHONE *(Include Area Code)* (804) 525-6627

STREET ADDRESS	CITY, STATE AND ZIP CODE
100 Crestview Drive	Forest, VA 24551
DATE OF BIRTH	8/25/49

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME
(If more than one list below)

NAME Lynchburg College
NUMBER OF EMPLOYEES, MEMBERS Cat B (101-200)
TELEPHONE *(Include Area Code)* (804) 544-8100
STREET ADDRESS Lynchburg, VA 24501
COUNTY 680

* * * *

CAUSE OF DISCRIMINATION BASED ON *(Check appropriate box(es))*

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☐ RETALIATION ☐ AGE
☐ DISABILITY ☐ OTHER *(Specify)*

DATE DISCRIMINATION TOOK PLACE

Earliest	*Latest*
06/06/97	06/06/97

☐ CONTINUING ACTION

THE PARTICULARS ARE *If additional space is needed, attach extra sheet(s)):*

1. I was hired as an Assistant Professor on a tenure track in August 1993. I was notified on June 6, 1997, that my petition for tenure is denied and my employment will be terminated effective May 1998.

2. Charles Warren, President, informed me that the Board of Trustees' decision was to deny my petition for tenure and promotion. His letter also stated that my employment with the College will be terminated effective May 1998.

3. I believe that I was denied tenure and terminated because of my sex (male) in violation of Title VII of the Civil Rights Act of 1964 as amended.

* * * *

I declare under penalty of perjury that the foregoing is true and correct.

4/7/98	/s/ Leonard Edelman
Date	Charging Party *(Signature)*

* * * *

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Dr. Charles Warren
President
Lynchburg College
1501 Lakeside Drive
Lynchburg, VA 24501

PERSON FILING CHARGE
Edelman, Leonard

THIS PERSON (check one)
☒ CLAIMS TO BE AGGRIEVED
☐ IS FILING ON BEHALF OF ANOTHER

DATE OF ALLEGED VIOLATION

Earliest	*Most Recent*
	06/06/97

PLACE OF ALLEGED VIOLATION
Lynchburg, VA

CHARGE NUMBER
122980526

NOTICE OF CHARGE OF DISCRIMINATION
(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

- ☒ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
- ☐ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
- ☐ THE AMERICANS WITH DISABILITIES ACT
- ☐ THE EQUAL PAY ACT (29 U.S.C., SECT 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☐ No action is required on your part at this time.
2. ☒ Please submit by 05/05/98 a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.
3. ☐ Please respond fully by _____ to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Richmond Area Office
3600 W. Broad Street
Room 229
Richmond, VA 23230

Irma Dillard, Supervisor
(Commission Representative)

(804) 278-4671
(Telephone Number)

☒ Enclosure: Copy of Charge

BASIS OF DISCRIMINATION
☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NAT. ORIGIN ☐ AGE ☐ DISABILITY
☐ RETALIATION ☐ OTHER

CIRCUMSTANCES OF ALLEGED VIOLATION
See enclosed Form 5, Charge of Discrimination.

DATE:
04/21/98

TYPED NAME/TITLE OF AUTHORIZED EEOC OFFICIAL
Gloria L. Underwood

SIGNATURE
/s/ Gloria L. Underwood

RESPONDENT'S COPY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Virginia Council On Human Rights
1100 Bank Street
Richmond, Virginia 23219

DATE 04/21/98
EEOC CHARGE 122980526
FEPA CHARGE

SUBJECT: CHARGE TRANSMITTAL
Edelman, Leonard *(Charging Party)* v. Lynchburg College *(Respondent)*

Transmitted herewith is a charge of employment discrimination initially received by the:
☒ EEOC ☐ _____ *(Name of FEPA)* on 04/15/98 *(Date of Receipt)*

☒ Pursuant to the worksharing agreement, this charge is to be initially investigated by the EEOC.

☐ Pursuant to the worksharing agreement, this charge is to be initially investigated by the FEPA.

☐ The worksharing agreement does not determine which agency is to initially investigate the charge.
- ☐ EEOC requests a waiver
- ☐ No waiver requested
- ☐ FEPA waives
- ☐ FEPA will investigate the charge initially

Please complete the bottom portion of this from to acknowledge receipt of the charge and, where appropriate, to indicate whether the Agency will initially investigate the charge.

TYPED NAME OF EEOC OR FEPA DIRECTOR
Gloria L. Underwood

SIGNATURE /s/ Gloria L. Underwood

Edelman, Leonard v. Lynchburg College
(Charging Party) *(Respondent)*

To whom it may concern:

- ☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention to initially investigate the charge
- ☐ This will acknowledge receipt of the referenced charge and indicate this Agency's intention not to initially investigate the charge
- ☐ This will acknowledge receipt of the referenced charge and request a waiver of initial investigation by the receiving agency.
- ☐ This will acknowledge receipt of the referenced charge and indicate this agency's intention to dismiss/close/not docket the charge for the following reason:

TYPED NAME OF EEOC OR FEPA DIRECTOR
Roxie Raines Kornegay

SIGNATURE

TO: Richmond Area Office
3600 W. Broad Street
Room 229
Richmond, VA 23230

DATE
EEOC CHARGE 122980526
FEPA CHARGE

LAW OFFICE OF
ALEXANDER W. BELL
715 COURT STREET
P.O. BOX 739
LYNCHBURG, VIRGINIA
24505-0739

ALEXANDER W. BELL
MARY V. BARNEY

LISA S. WHITE
Paralegal

TELEPHONE
(804) 528-0411

FACSIMILE
(804) 845-3666
E-MAIL: awb@abellaw.com

May 29, 1998

Irma Dillard, Supervisor
EEOC
Richmond Area Office
3600 W. Broad Street, Room 229
Richmond, VA 23230

RE: EEOC Charge No. 122980526

Dear Ms. Dillard:

This letter constitutes the position statement of Lynchburg College in this matter. Dr. Leonard Edelman, formerly an assistant professor of biology at Lynchburg College, has claimed that he was denied tenure and promotion to associate professor based on his gender. Edelman's claim of discrimination is not only untimely filed with the EEOC, it is entirely without basis.

The Untimeliness of Edelman's Charge

The College notes first that Dr. Edelman's EEOC charge was not timely filed. Dr. Edelman filed his charge on April 15, 1998, 327 days after May 23, 1997, when he was informed that his requests for tenure and promotion had been denied by the

College's Board of Trustees (Exhibit 1).[1] Edelman received the notice through campus mail on May 23, 1997, the same day the Trustees met. The notice was also sent by certified mail, and was apparently received by Edelman on June 6, 1997, the date he identifies in his EEOC charge. Regardless of which date is used, Edelman's charge was filed too late and must be dismissed as untimely.

Lynchburg College

Lynchburg College ("the College") is a liberal arts college located in Lynchburg, Virginia. It has approximately 1,280 undergraduate students. During the 1997-1998 academic year, the College had 106 full-time faculty, of whom 74 were tenured, 13 were on the tenure track, and 19 were not on the tenure track. Fifty-four of the 74 tenured faculty were male, as were 5 of the 13 on the tenure track and 9 of the 19 faculty not on the tenure track. The Biology Department, of which Dr. Edelman was a member, had 5 faculty during the 1997-1998 academic year, all of whom were male, and 3 of whom were tenured.

Edelman's Work History and the Tenure Process at Lynchburg College

Dr. Edelman was hired as an assistant professor of biology in May of 1993. He had previously taught at Stockton State College for three years. While faculty at Lynchburg College ordinarily teach for six years before being considered for

---

[1] In states that have established a qualifying "deferral agency", complainants have 300 rather than 180 days to file their charges with the EEOC, *see* 42 U.S.C. § 2000e-5(e)(1), but Edelman missed even the 300-day deadline. This is true whether May 23 or June 6, 1997 is used as the operative notification date. It should be noted that the Federal District Court for the Western District of Virginia has ruled that Virginia is not a deferral state, *see, e.g., Tokuta v. James Madison University*, 977 F.Supp. 763 (W.D. Va. 1997) (on appeal to the Fourth Circuit).

tenure, Edelman at his own request was placed on a faster four-year track. In 1996, he received a "mid-level' merit salary increase. In 1997, he did not receive a merit salary increase.

Dr. Edelman came up for tenure during the 1996-1997 academic year. The College's Faculty Handbook sets out the procedures for consideration of tenure, as follows. Candidacy for tenure is reviewed by the candidate's department chairperson, and also by an ad hoc committee composed of three faculty members selected by the candidate. Both the ad hoc committee and the chairperson forward a recommendation to the Faculty Personnel Committee. That Committee makes a recommendation to the Dean of the College, who in turn makes a recommendation to the President of the College. The President reviews all four recommendations, along with materials submitted by the candidate and other participants in the review process. The President then makes a recommendation to the Board of Trustees, which makes the final decision.

In Dr. Edelman's case, the department chairperson, the ad hoc committee, and the Personnel Committee recommended in favor of tenure (Exhibits 2, 3, and 4). Dr. Jacqueline Asbury, Dean of the College, recommended that tenure be denied (Exhibit 5). Charles Warren, President of the College, also recommended against tenure (Exhibit 6). The Board of Trustees denied tenure to Dr. Edelman on May 23, 1997 (Exhibit 1). As is required in such cases, Edelman was offered a contract to teach at the College for one more year, and he accepted this offer for the 1997-1998 academic year. His employment with the College has now ended.

In the midst of the review process, before Dean Asbury's recommendation was finalized, Dr. Edelman filed a grievance concerning the Dean's recommendation. The Faculty Handbook does not authorize a grievance at this stage of the

process. Nonetheless, a faculty grievance committee met to consider Edelman's complaint and issued a report and recommendations (Exhibit 7). It is apparent from the report that the committee's primary concern was that the Dean's recommendation was not in line with those of the faculty committees involved. While the grievance committee of course had no authority to change the Dean's recommendation, the committee "encouraged" Dr. Warren and the Dean to meet with the relevant faculty to discuss the procedures and standards used to evaluate Edelman.

In his response to the grievance committee, Dr. Warren correctly took the position that a new round of meetings and re-evaluation of Dr. Edelman would be inconsistent with the procedures prescribed by the Faculty Handbook and also the Board of Trustees. However, Dr. Warren offered, subject to Edelman's agreement, to consider any additional statements from the faculty and the Dean (Exhibit 8).

Dr. Edelman responded by expressing concern that Dr. Warren's proposal could produce worrisome "unexpected consequences". He also stated that the "wealth of information" already provided to Dr. Warren provided ample grounds for a tenure decision. Having stated his "reservations" concerning Dr. Warren's proposal, Edelman stated that he consented to it (Exhibit 9). Given the pervasive nature of Edelman's expressed concerns, Dr. Warren decided to defer to those concerns (Exhibit 10). Accordingly, Dr. Warren proceeded with his evaluation of Edelman's candidacy based on the "wealth of information and documentation" referred to by Edelman in support of his candidacy (Exhibit 9). Dr. Warren, acting strictly in accord with the procedures set forth in the Faculty Handbook, recommended that tenure be denied.

Edelman's Lack of Qualification for Tenure

Tenure decisions are based on teaching, scholarship, and service to the College. Tenure is not granted to teachers as a matter of right. It has historically been awarded by the governing boards of institutions only to those candidates who have met a rather substantial burden of demonstrating their past and likely future effectiveness as teachers, scholars, and college citizens. Because fellow faculty -- especially in small departments -- have a strong tradition of wholesale recommendation of their colleagues for tenure, these decisions are not left to the faculty's discretion, but are placed in the hands of the administration and ultimately the Board of Trustees. This is the case not only at Lynchburg College, but also at virtually all colleges nationwide.

In Dr. Edelman's case, the faculty who reviewed his qualifications recommended tenure. Reasonable academics acting in good faith can and often do disagree, however, on what constitutes evidence of effective teaching, scholarship, and service sufficient to meet the burden required for a grant of tenure. It should be noted that the faculty letters recommending tenure are not whole-hearted endorsements, and are devoid of meaningful discussion of scholarly, as opposed to service, activities. Careful review of the record by Dr. Warren, himself a biologist, revealed that Edelman had not made the required affirmative case for tenure.

Given the record, Dr. Warren's decision is hardly surprising. Dr. Edelman's teaching reviews, while not entirely negative, were decidedly mixed. Moreover, evidence of Dr. Edelman's scholarship after 1991 is practically non-existent. The College's printed reviews of faculty scholarship for academic years 1993 through 1997 reveal no entries whatsoever for Dr. Edelman. While Dr. Edelman mentioned publications

supposedly under preparation, these have not seen the light of day.

Since hiring counsel, Edelman has made a number of claims concerning his record at Lynchburg College that are intended to support his argument that he deserved tenure. Some of these claims -- for example, that his "student evaluations were overwhelmingly positive," that his scholarly productivity was high "compared to the productivity of other tenure-track faculty," and that he was "the only faculty member at that time engaged in funded scientific research" -- are simply false. Other claims -- for example, that Edelman was sent to faculty development seminars "premised upon his excellence in teaching, scholarship and research", have a kernel of truth but are highly exaggerated. In this example, the seminars referred to are ordinary faculty development seminars for which the level of excellence described by Edelman was not required, and which Edelman certainly did not achieve. The College would be pleased to provide to the EEOC information concerning any claims concerning his performance at the College that Edelman may raise in his submissions to the agency.

Edelman's Claim of Gender Discrimination

In his charge to the EEOC, Dr. Edelman states that he was "denied tenure and terminated because of my sex (male) in violation of Title VII of the Civil Rights Act of 1964, as amended." The charge contains no facts in support of this allegation, and the record reveals no evidence of discrimination. As noted above, the College has far more male tenured faculty than female, and has both males and females on the tenure track and in non-tenure track positions. Also, due to a large increase in enrollment, the College has hired 14 full-time faculty for the coming year, with one offer still outstanding. Six of these new faculty are female and eight are male; the outstanding offer is to a male. Three of the new

faculty, two females and one male, will be assistant professors of biology. The male and one of the females are on the tenure track.

While Edelman's charge does not discuss the basis of his claim, a letter received by the College from Edelman's counsel indicates that his accusation of gender discrimination focuses solely on Dean Asbury, whom he accuses of "a clear pattern of adverse treatment of white males." Edelman's counsel's letter to the College goes on to make the following allegation:

> Our investigation has revealed that since the beginning of [Dean of the College] Asbury's tour as dean four years ago, all non-renewals of contracts and denials of tenure and promotion decisions have occurred exclusively to white males at the College, while all positive tenure and promotion decisions have occurred only for the benefit of women, with the exception of one hispanic male.[2]

This allegation is false. Both males and females have been granted tenure and promotions since the 1993-1994 academic year, Dean Asbury's first full academic year in the position. More females than males have come up for tenure during this time period, but this is the result of the ordinary tenure cycle of faculty who were hired before Asbury became dean. Also, contrary to Edelman's assertion, both male and female faculty have had negative adjustments of their employment status, including nonrenewal of employment contracts, during this time period.

---

[2] Through the use of the term "white male" and other racial references, Edelman has hinted that he was discriminated against on the basis of race as well as gender. His EEOC charge does not raise a race discrimination claim, however, and therefore the College does not respond to such a claim, other than to state that any such claim would be groundless.

Edelman also claims, inexplicably, that Dean Asbury has made "two abortive attempts to remove at least two tenured professors during this time period, both of them white males." This is not true, and in fact is so far from true that the College simply does not know what Edelman is alluding to.

Finally, Edelman has complained that during the same year his tenure was considered, the College granted tenure to two female professors in another department, Communications Studies. Apparently Edelman finds it difficult to believe that two qualified female scholars came up for tenure at the same time. But this is precisely what happened, and these women's success in achieving tenure provides no evidence that discrimination was at work in Edelman's failure to do so.

The College is well aware that Dr. Edelman regards Dean Asbury's recommendation to Dr. Warren as flawed and discriminatory. However, even if this were true -- which it is not -- Dr. Warren conducted an independent review of the record in reaching his recommendation concerning Dr. Edelman. This is precisely what Edelman himself urged the President to do. As far as the College is aware, Edelman has yet to accuse Dr. Warren of anti-male bias.

The College recognizes that denial of tenure is a difficult and painful experience. Unfortunately, Dr. Edelman has chosen to channel his disappointment over a professional failure into a baseless and irresponsible claim of discrimination.

Conclusion

The College asks that the Commission dismiss Edelman's claim as untimely. In the alternative, the College asks that the Commission conclude its investigation and issue a no cause determination. Please do not hesitate to contact counsel for the College with any questions.

Sincerely,

/s/ Mary V. Barney

Mary V. Barney

MVB/djh
enclosures

bcc: Charles Warren
Lynchburg College

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Richmond Area Office

[Seal]

3600 West Broad Street
Room 229
Richmond, VA 23230
(804) 278-4651
TTY (804) 278-4654
FAX (804) 278-4660

DECLARATION

I, Gloria L. Underwood, Director of the Equal Employment Opportunity Commission (EEOC) Richmond Area Office, am the official custodian of the records maintained in the Richmond Area Office.

I have reviewed the EEOC file, Leonard Edelman vs Lynchburg College, Charge Number 122-98-0526. Based on that review I state the following:

1. On November 18, 1997, Leonard Edelman's letter dated November 14, 1997 alleging employment discrimination was received in the EEOC Richmond Area Office. (Attachment 1) The letter identified the complaining party, the respondent, the date of harm, and detailed allegations of discrimination based on gender, national origin, and religion, all allegations of discrimination covered by the statutes enforced by the EEOC.

2. On November 28, 1997, the EEOC Richmond Area Office received a letter dated November 26, 1997 and addressed to Rosalind Hall-Smith, Supervisor of the Charge Receipt/Technical Information Unit of the Richmond Area Office, from Mr. Edward L. Hogshire, attorney for Mr. Edelman. (Attachment 2) Mr. Hogshire communicated his

understanding that Mr. Edelman's letter dated November 14, 1997 served as a complaint of discrimination for purposes of determining the filing date. Mr. Hogshire requested that Ms. Hall-Smith advise him if the EEOC was of the opinion that any delay in scheduling a personal interview between Mr. Edelman and an EEOC Investigator and serving finalized charging documents on the respondent would compromise his understood filing date of November 14, 1997.

3. My review of the file indicates that the EEOC considered Mr. Edelman's November 14, 1997 letter as a minimally sufficient charge and that the Richmond Area Office began its intake process by drafting correspondence requesting more information and seeking to schedule an interview. The file does not indicate that Ms. Hall-Smith responded to Mr. Hogshire's November 26th letter by advising him of any contrary position.

4. On December 4, 1997, Rosalind Hall-Smith sent Mr. Edelman a letter dated December 3, 1997 advising Mr. Edelman of the agency's need for additional information to further investigate his case. The letter requested that Mr. Edelman contact our office to arrange for an interview (Attachment 3)

5. Mr. Edelman responded to the December 4th letter by contacting this office and, on February 17, 1998, Ms. Hall-Smith sent an appointment notice of that same date advising Mr. Edelman that he was scheduled for an interview on Tuesday, March 3, 1998 at 2:00 p.m. (Attachment 4).

6. On March 3, 1998, Regina McPhie, Investigator, conducted a telephone interview with Mr. Edelman resulting in the perfected charge of sex discrimination, i.e., the verified charge on EEOC Form 5, being drafted for Mr. Edelman's signature.

7. On March 18, 1998, the drafted charge was mailed to Mr. Edelman for his signature.

8. On April 15, 1998 Mr. Edelman's signed perfected charge was received in the Richmond Area Office. My review of the file indicates that the EEOC considered the perfected charge to relate back to the November 14, 1997 letter originally setting forth Mr. Edelman's allegations.

I declare under penalty of perjury that the foregoing is true and correct.

August 9, 1999
Date

/s/ Gloria L. Underwood
Gloria L. Underwood
Area Director
Equal Employment Opportunity Commission
3600 West Broad Street; Room 229
Richmond, VA 23230

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Richmond Area Office

[Seal]

3600 West Broad Street
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DECLARATION

I, Rosalind Hall-Smith, am the supervisor of the Charge Receipt/Technical Information Unit (CR/TIU) in the Equal Employment Opportunity Commission (EEOC) Richmond Area Office.

I have reviewed the letter dated November 26, 1997 from Edward L. Hogshire, attorney for Leonard Edelman, which is a part of the EEOC file, Leonard Edelman vs Lynchburg College, Charge Number 122-98-0526. I do not specifically recall the telephone conversation that I had with Mr. Hogshire. However, when I discuss the issue of timeliness, I generally advise individuals to the effect that if the correspondence they submit to the EEOC identifies the complaining party, the Respondent, the date of harm, and an allegation of employment discrimination covered by the statutes enforced by EEOC, then EEOC would consider the correspondence to satisfy the statutes as to what a charge should contain.

Having reviewed Mr. Edelman's file and based on my general practice, I would have considered Mr. Edelman's letter dated November 14, 1997 as a minimally sufficient charge. Therefore, I would have considered the signed perfected charged of discrimination on EEOC Form 5, received in the

EEOC Richmond Area Office on April 15, 1998, to relate back to the November 14, 1997 filing date.

I declare under penalty of perjury that the foregoing is true and correct.

8/9/99
Date

/s/ Rosalind Hall-Smith
Rosalind Hall-Smith
Supervisor, CR/TIU
Equal Employment Opportunity Commission
3600 West Broad Street, Room 229
Richmond, VA 23230

IN THE UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

DR. LEONARD EDELMAN

Plaintiff,

v. Civil Action No. 6:99CV0060

LYNCHBURG COLLEGE

Defendant.

DECLARATION

COMES NOW the Plaintiff, DR. LEONARD EDELMAN, and says the following:

1. On November 14, 1997, by facsimile and first class mail, I forwarded a letter containing allegations of discrimination on the basis of my sex, national origin and religion, a copy of which is attached hereto as Exhibit 1. In my letter, I requested the EEOC to accept my letter as my charge of employment discrimination against Lynchburg College.

2. On November 26, 1997, my attorney, Edward L. Hogshire, forwarded a letter to the EEOC confirming his telephone conversation with Rosalind Hall-Smith of the EEOC, a copy of which is attached hereto as Exhibit 2. In that letter, Mr. Hogshire reiterates Ms. Hall-Smith's assurance that, even though an interview was to be conducted, the EEOC would still consider the charge to be filed as of November 14, 1997.

3. On or about December 3, 1997 I received a letter from the EEOC setting forth instructions for scheduling the interview, a copy of which is attached hereto as Exhibit 3. The letter also stated that more information was needed in order for the EEOC to "continue investigating" my case.

4. Soon after receipt of the EEOC's December 3, 1997 letter, I contacted the EEOC to schedule the interview. Due to the EEOC's delays in returning my call and working to schedule the interview, the interview was not conducted until March 3, 1998. Some time after February 17, 1998, I received an EEOC Appointment Notice, a copy of which is attached hereto as Exhibit 4.

5. Sometime after that interview, the EEOC forwarded me a form entitled "Charge of Discrimination" for my signature. I signed the document on April 7, 1998 and forwarded it to the EEOC.

I declare under penalty of perjury that the foregoing is true and correct.

8/5/99 /s/ Dr. Leonard Edelman
Date Dr. Leonard Edelman

CASE LOG
(Continued on Reverse)

CHARGE NO.	RESPONDENT	CHARGING PARTY
122980526	Lynchburg College	Leonard Edelman

DATE	ACTION	ENTERED BY
11/14/97	Received faxed correspondence in office	RHS
11/19/97	Submitted for AG	RHS
12/4/97	Mailed [illegible]	JES
2/5/98	PCP is listed on the appt schedule for 3/3/98 2:00 pm walk-in	[illegible]
2/17/98	~~Charge # assigned and recorded~~ Appt letter mailed	[illegible]
3-3-98	called & did telp. Intv. Drafted Affidavit on P.C. counselled	REM
3-12-98	Drafted charge. called PCP talked him for Social Secruity #; Left message on tape.	REM
3-12-98	PCP called & Left his SS # on my voice mail. Added to file & completed assigment sheet. Turned in.	REM

DATE	ACTION	ENTERED BY
3/18/98	Mailed charge	dtm
4/10/98	Charge # assigned and recorded in charge register	[illegible]
5-29-98	~~Call~~ R's position & doc. faxed to ofc.	REM
6-1-98	Rec'd R's position pkg. Read position	REM
6-1-98	called R's Atty. to disc. CP's timelines	REM
7-17-98	Faxed 1st page CP's LX	[illegible]
7-20-98	Talked to [illegible]	[illegible]
7-21-98	[illegible]	[illegible]
7/21/98	RFI & letter to CP	dtm
7-28-98	In person intv. w/CP in ofc. Took affidavit.	REM
8-7-98	Rec'd. CP's follow-up letter.	
1-14-99	met w/TMC/Legal on case.	REM

DATE	ACTION	ENTERED BY
1-15-99	called CP's Atty. Left message.	REM
1-22-99	called CP' Atty. " "	REM
3-2-99	called CP's Atty. Left message	REM
3/02/99	conducted PDL w/ Atty. & [illegible]	REM
3/12/99	Rec'd. Reqt. 4 RTS	REM
3/15/99	Organized file.	REM
3/16/99	completed file/tabbed. Did memo & turned in. Request for RTS.	REM ↓
3/19/99	Type corresp. for sig.	ms
3/22/99	Received [illegible]	[illegible]
3/24/99	Signed RB	fa
3/29/99	Mailed corresp/Transf CR [illegible]	ms

Intake Notes

TITLE: Dr. SS# 079-40-1153

DOB: 8-25-49

RACE: White

SEX: male

religious and national origin discrimination discounted. Do not include as a basis.

contact person(s): (CP) Edward L. Hogshire, Esq.
Buck, Hogshire & Tereskerz, Ltd.
211 East High Street
Charlottesville, VA. 22902
(804) 977-7977

Respondent: Charles Warren, President
Lynchburg College
1501 Lakeside Drive
Lynchburg, VA. 24501
(804) 544-8200

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

DR. LEONARD EDELMAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL99021183-01
	)	
LYNCHBURG COLLEGE,	)	
	)	
Defendant.	)	
	)	

ORDER

On December 14, 1999, the parties, by counsel, appeared before the Court and argued the defendant's Demurrer to the plaintiff's Second Amended Motion for Judgment. Upon consideration of the pleadings and the argument of counsel, it is ORDERED that the defendant's Demurrer is sustained and this case is dismissed without leave to amend for the reasons stated in the letter opinion dated February 17, 2000.

The Clerk shall send copies of this order to all counsel of record.

ENTERED: 3-1-00

/s/ Mosby G. Perrow
HONORABLE MOSBY G. PERROW, III

We ask for this:

/s/ Alexander W. Bell
Alexander W. Bell
Mary V. Barney
ALEXANDER
BELL, PLC
715 Court Street
Counsel for defendant

C.C. A.W.B.
C.C. K.H.S.
C.C. E.C.B.

Seen and objected to:

/s/ Kristine H. Smith
Kristine H. Smith, Esquire
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Charlson Bredehoft, P.C.
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Counsel for plaintiff

TWENTY-FOURTH
JUDICIAL CIRCUIT
OF VIRGINIA

RICHARD S. MILLER
JUDGE
LYNCHBURG CIRCUIT COURT
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[SEAL]

MOBSY G. PERROW, III
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COMMONWEALTH OF VIRGINIA
CITIES OF LYNCHBURG AND BEDFORD
COUNTIES OF AMHERST, BEDFORD, CAMPBELL AND NELSON

February 17, 2000

Alexander W. Bell, Esq.
P.O. Box 739
Lynchburg, VA 24505

Elaine Charleson Bredhoft, Esq.
Charlson Bredehoft, P.C.
11260 Roger Bacon Drive
Suite 201
Reston, VA 20190

Re: *Leonard Edelman v.*
Lynchburg College

Dear Counsel:

The parties are before the Court on the defendant's demurrer to the plaintiff's second amended motion for judgment. The arguments made and authorities cited by counsel have been carefully considered. The demurrer will be sustained without leave to amend.

The case was commenced on January 13, 1999, with the filing of a three count motion for judgment alleging wrongful termination of employment, breach of contact and intentional infliction of emotional distress. Service of process was not sought at that time. On June 10, 1999, the plaintiff, with leave of Court, filed a six count amended motion for judgment alleging discrimination in the course of employment in violation of Title VII, wrongful termination of employment in violation of Title VII, negligent retention, breach of contract, intentional infliction of emotional distress, and defamation. The case was then removed to federal court where the two Title VII counts were dismissed with prejudice and the federal court remanded the case to this Court for prosecution of the remaining common law counts of negligent retention, breach of contract, intentional infliction of emotional distress and defamation. On October 19, 1999, this Court sustained a defense demurrer to those four counts with leave to amend the contract and defamation counts. On November 9, 1999, the plaintiff filed a second amended motion for judgment alleging breach of contract. The defamation count was not repled.

The issue is whether the second amended motion for judgment states a cause of action for breach of contract. Upon careful review of that pleading and the exhibits incorporated therein by reference, I am compelled to conclude that the second amended motion for judgment does not state a cause of action for breach of contract.

"[A] court considering a demurrer may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings," *Wards Equip. Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382 (1997). The letter contract and that portion of the faculty handbook incorporated in that contract by reference contradict the plaintiff's factual allegations of "wrongful denial of tenure and termination in breach of his

contract of employment with the College" (paragraph 2 of Second Amended Motion for Judgment).

Mr. Bell is requested to prepare an appropriate order for endorsement by counsel and presentation to the court for entry.

Very truly yours,

/s/ Mosby G. Perrow
Mosby G. Perrow, III, Judge

MGP, III/vkh
cc: Kristine Smith, Esq.
Larry Palmer, Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 20th day of September, 2000.

Dr. Leonard Edelman, Appellant,

against Record No. 001288
Circuit Court No. CL 99021183-01

Lynchburg College, Appellee.

From the Circuit Court of the City of Lynchburg

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ Wendy L. Tuck

AUG 30 2001

(5)

No. 00-1072

Supreme Court, U.S.
FILED
AUG 30 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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**Counsel of Record*

Counsel for Petitioner

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

HOPP

QUESTION PRESENTED

Is 29 C.F.R. § 1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," invalid?

PARTIES

The parties to this proceeding are set forth in the caption.

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OPINIONS BELOW

The October 2, 2000 opinion of the court of appeals, which is reported at 228 F. 3d 503 (4th Cir. 2000), is set out at Joint Appendix ("JA") 32-46. The September 20, 1999 memorandum opinion of the district court, which is reported at 66 F. Supp. 2d 777 (W.D.Va. 1999), is set out at JA 24-31. The September 20, 1999 order of the district court, which is not officially reported, is set out at JA 24-31.

JURISDICTION

The decision of the court of appeals was entered on October 2, 2000. The petition for writ of certiorari was filed on January 2, 2001. This Court granted certiorari on June 25, 2001. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

STATUTES AND REGULATION INVOLVED

Section 706(b) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b), states in pertinent part, "Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires."

Section 706(e)(1), 42 U.S.C. § 2000e-5(e)(1), provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier,

and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 1601.12(b) of 29 C.F.R. provides in pertinent part:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received.

STATEMENT OF THE CASE

Petitioner Leonard Edelman was hired in 1993 as a member of the biology faculty at respondent Lynchburg College. In 1996 he applied for tenure. Despite favorable recommendations from the chair of his department and a faculty committee, on June 6, 1997, the president of the college advised Edelman by letter that tenure had been denied. As a result of that denial of tenure, Edelman's employment by the college subsequently ended.

On November 14, 1997, Edelman faxed to the Richmond office of the EEOC a five page single-spaced letter alleging that the denial of tenure and consequent dismissal were the result of discrimination on the basis of gender, religion and national origin. (JA 47-53). The letter was received by the EEOC 161 days after the alleged discriminatory denial of tenure.[1] The letter asserted that the Dean of the college had been

[1] Under a worksharing agreement then in effect between the EEOC and the Virginia Council on Human Rights, "the EEOC and the [Council] each designate the other as its agent for the purpose of receiving . . . charges. EEOC's receipt of charges on the [Council's] behalf will automatically initiate the proceedings of both EEOC and [the Council] for the purposes of Section 706(c) and (e)(1) of Title VII." (Court of Appeals Appendix, pp. 92-93). This arrangement is discussed in *Puryear v. County of Roanoke*, 214 F. 3d 514, 518-19 (4th Cir.2000). Charges filed with the Council need not be verified (Court of Appeals Appendix, pp. 99-111).

systematically purging white men from the faculty, and concluded:

> I hereby file a charge of employment discrimination against Lynchburg College (Dean Jacqueline Asbury, President Charles Warren and the Board of Trustees) and I call upon the EEOC to investigate this case . . .

(JA 52-53). The letter was not submitted under oath.

On November 26, 1997, Edelman's attorney sent another letter to the EEOC. The letter requested that an agency investigator interview Edelman prior to serving the college. This letter cautioned,

> It is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct.

(JA 54-55). EEOC officials never disputed the attorney's understanding that the November 14 letter constituted a Title VII charge.

EEOC did not schedule the requested interview until March 3, 1998. On March 18, 1998, the EEOC mailed to Edelman for his signature under oath an EEOC Form 5, "Charge of Discrimination," which it had prepared based on that interview and on his earlier letter. The accompanying letter from the EEOC characterized Edelman's earlier letter as a "charge of employment discrimination," and set no deadline for the return of the Form 5. Edelman's verified Form 5 was filed with the EEOC on April 15, 1998. After completing its investigation, the EEOC issued Edelman a right-to-sue letter on March 26, 1999.

Edelman initially filed this action in state court, alleging a violation of Title VII and of several state statutes. Lynchburg college removed the action to federal court. The College then moved to dismiss the Title VII claim on the ground that Edelman had failed to file a timely charge of discrimination.

Under the terms of Title VII, Edelman was obligated to file such a charge within 300 days of the June 6, 1997 letter notifying him of the denial of tenure. Edelman's November 14,

1997 letter fell well within the limitations period, but the verified Form 5 was not received by EEOC until 313 days after June 6, 1997. (JA 62-63). Officials at the EEOC's Richmond office submitted declarations stating that the substantive allegations of the November 14, 1997 letter were sufficiently detailed to constitute a charge, and that the EEOC had regarded the verified Form 5 as relating back to the earlier letter.[2]

The district court dismissed Edelman's Title VII claims on the ground that he had not filed a timely Title VII charge, and remanded his remaining state law claims to state court. (JA 24-31). On appeal, the Fourth Circuit concluded that the controlling problem was that the November 14 "letter was not sworn to under oath or affirmation." (JA 35). Section 706(b) states that a charge "shall be under oath or affirmation." Edelman relied on an EEOC regulation which permits such a lack of verification to be corrected by a later sworn statement. "A charge may be amended to cure technical defects or omissions, including the failure to verify the charge . . . . Such amendments . . . will relate back to the date the charge was first received." 28 C.F.R. § 1601.12(b).

The appeal thus turned on a dispute regarding the validity of the EEOC regulation. A majority of the court of appeals concluded that the regulation was invalid, insisting that the language of Title VII unambiguously required that the EEOC receive a sworn charge within the 300 day limitation period. (JA 32-33, 36-40). The majority also rejected Edelman's argument that his reliance on the disputed regulation warranted equitable tolling. (JA 43). In a concurring opinion, Judge Luttig argued that the regulation was valid, but would on other grounds have affirmed the dismissal of the Title VII claims. (JA 45-46).

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[2] JA 78-82.

SUMMARY OF ARGUMENT

Section 713(a) authorizes the EEOC to issue "procedural regulations to carry out the provisions" of Title VII. Like Rule 15 of the Federal Rules of Civil Procedure, which authorizes and provides for the relation back of amendments, § 1601.12(b) deals with procedure because it regulates the "process for enforcing rights and duties recognized by substantive law." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

Section 1601.12(b) provides that an otherwise sufficient Title VII charge may be verified after the end of the charge-filing period. Under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), § 1601.12(b) must be upheld unless either the text of Title VII forbids relation back of verification or the regulation itself constitutes an unreasonable interpretation of the law.

Section 706(e)(1), which establishes a deadline for the filing of a charge, makes no mention of verification. Section 706(b), which requires verification, sets no deadline by which that is to occur. A literal reading of these two provisions indicates that only filing, but not verification, is subject to the § 706(e)(1) deadline.

The court below erred in concluding that Title VII *defines* "charge" to mean an allegation under oath or affirmation. Section 706(b) is a requirement, not a definition. It provides that "charges shall be . . . under oath or affirmation," not that "charges are allegations under oath or affirmation." A charge that is not yet under oath or affirmation is an unverified charge, not an "uncharge."

Section 1601.12(b) is consistent with the pre-1964 liberal treatment of amendments to charges under the National Labor Relations Act. Although the NLRB required that unfair labor practice charges be verified, the lack of such verification did not invalidate an otherwise sufficient charge. *Union Starch & Refining Co. v. National Labor Rel. Bd.*, 186 F. 2d 1008, 1013 (7th Cir. 1951).

This Court has long refused to read into the charge-filing provisions of Title VII any procedural requirements not "compelled by the plain meaning of the statutory language." *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 (1980). "Such

technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 404 U.S. 522, 526-27 (1972).

Section 1601.12(b) is a reasonable solution to a serious practical problem in the administration of Title VII. Most aggrieved individuals do not know of the § 706(b) verification requirement when they first contact the EEOC. Often, as occurred in both *Love* and *Mohasco*, complainants initially contact the EEOC by letter. Because of the shortness of the charge filing periods, it is often impracticable for the EEOC to arrange for verification before the end of the period; equally importantly, a precipitous effort to obtain immediate verification would interfere with the EEOC's responsibility to assure that a charge is complete and accurate.

Where litigants are required under federal or state law to verify their pleadings, they have long been permitted to amend those pleadings at a later time to supply or correct that verification. "Even if the statute requires verification, the filing of an unverified complaint will commence the action so as to toll the statute of limitations." 1A Barron and Holtzoff, Federal Practice and Procedure, § 333 pp. 271 (1960). Federal litigants are generally permitted to correct errors of this sort. *Becker v. Montgomery*, 121 S.Ct. 1801 (2001). In adopting § 1601.12(b), the EEOC reasonably concluded that a Title VII charge should not be subject to more stringent procedural requirements than would apply to formal pleadings.

ARGUMENT

I. THE RELATION-BACK RULE IN § 1601.12(b) MUST BE UPHELD UNLESS TITLE VII UNAMBIGUOUSLY REQUIRES THAT A CHARGE BE VERIFIED WITHIN THE CHARGE FILING PERIOD

This case involves the exercise by the EEOC of the rulemaking authority expressly established by § 713 of Title VII. Section 713(a) provides that "The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this subchapter." 42 U.S.C. § 2003-12(a). The EEOC lacks the

authority to issue binding rules and regulations regarding the substantive commands of Title VII. *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). But, as the Court recognized in *General Electric v. Gilbert*, 429 U.S. 125, 141 n. 20 (1976), Congress did choose to confer such power on the Commission with regard to procedural matters.

The relation-back provision of § 1601.12(b) is undeniably procedural in nature, and thus within the scope of § 713(a). It regulates the "process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Section 713(a) is similar to the Rules Enabling Act, which authorizes this Court to prescribe "general rules of practice and procedure," but not rules which would "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. The Rules Enabling Act has long and properly been understood to authorize Rule 15 of the Federal Rules of Civil Procedure, which permits amendments to pleadings and governs when those amendments will relate back to the date on which the relevant pleading was originally filed. See *Foman v. Davis*, 371 U.S. 178, 181 (1963). Section 1601.12(b) is an analogous procedural regulation of administrative proceedings before the EEOC.

Because this case involves an exercise of the Commission's rulemaking authority, it is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron* the validity of a regulation turns on a two step analysis. First, the Court must determine

> whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. at 842-43. In the absence of such a clear intent, however, an agency's interpretation must be upheld so long as it is "a reasonable one." 467 U.S. at 845.

Section 713(a) specifically provides that the EEOC must comply with the requirements of the Administrative Procedure

Act when it issues procedural regulations. "Regulations issued under this section shall be in conformity with the standards and limitations of subchapter II of chapter 5 of Title 5." 42 U.S.C. § 2000e-12(a).[3]

> It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.

United States v. Mead Corp., 121 S.Ct. 2164, 2172 (2001).

Two additional circumstances make application of *Chevron* deference particularly appropriate in this case. First, § 1601.12(b) was originally promulgated by the EEOC in July 1966, only a year after the effective date of Title VII and the creation of the EEOC.[4] Such contemporaneous regulations have always been accorded particular weight, in part because the drafters are assumed to have an understanding of the underlying congressional purposes. EEOC's "contemporaneous construction" of Title VII "deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981).

Second, in 1972 Congress both rewrote the verification requirement now contained in § 706(b), and amended the charge filing deadline in § 706(e). By 1972 the predecessor of § 1601.12(b) had been in existence for six years; during the Senate debates the text of the EEOC procedural regulations, including the predecessor of § 1601.12(b), was placed in the Congressional Record. 118 Cong. Rec. 717-18 (1972). The lower courts prior to the 1972 legislation had repeatedly upheld

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[3] The referenced subchapter of Title 5, 5 U.S.C. § 551-59, is the Administrative Procedure Act.

[4] 31 Fed. Reg. 10269 (1966). Prior to 1977 this regulation was codified in 29 C.F.R. § 1601.11(b)(1975).

The EEOC explained at the time that it had promulgated § 1601.11(b) "to describe more clearly the present Commission policy with respect to the filing and amendment of charges." 31 Fed. Reg. 10269.

and applied the predecessor of § 1601.12(b).[5] And this Court, in *Love v. Pullman Co.*, 404 U.S. 522, 524 (1972), had noted that the EEOC in 1966 had "treated [a] letter as a complaint" "[i]n accordance with its usual practice."[6] Congress can be presumed to have approved this longstanding interpretation of Title VII when it extensively rewrote the applicable provisions of § 706 without attempting to overturn that regulation. Congress's failure to disapprove the Commission's longstanding regulation "suggests its consent to the Commission's practice." *Associated Dry Goods*, 449 U.S. at 600 n. 17.

II. THE TERMS OF TITLE VII DO NOT REQUIRE VERIFICATION OF A CHARGE WITHIN THE CHARGE FILING PERIOD

This case concerns the interrelationship between § 706(b) and § 706(e)(1) of Title VII. Section 703(e)(1) provides that "[a] charge under this section shall be filed within" a specified period of time; for most plaintiffs today the charge filing period

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[5] *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969)(citing cases); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 466 (5th Cir. 1969)(noting that earlier Fifth Circuit decisions had "approved the EEOC's regulation"); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F. 2d 228, 230-31 (5th Cir. 1969)(affirming district court decision which "sustained the validity of" the predecessor of § 1601.12(b)); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357, 359-60 (7th Cir. 1968); *Washington v. T.G. & Y. Stores, Co.*, 324 F. Supp. 849, 853 (W.D.La. 1971); *Moss v. The Lane Co.*, 50 F.R.D. 122, 126-27 (W.D.Va. 1970); *Wilson v. Monsanto Co.*, 315 F. Supp. 977, 978 (E.D.La. 1970); *Bremer v. St. Louis Southwestern R. Co.*, 310 F. Supp. 1333, 1339 (E.D.Mo. 1969); *Marquez v. Ford Division of Ford Motor Co.*, 1968 WL 162 *2 (D.Neb.); *see Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455, 461-62 (5th Cir. 1970).

[6] *Love* cited the portion of the predecessor of § 1601.12(b) which provides that a charge is sufficient if it identifies the parties and "describe[s] generally" the practices complained of. 404 U.S. at 524 n. 2. It appears that the letter in this case was actually filed by the EEOC prior to the promulgation of that regulation. The relevant state officials on June 1, 1966, waived their opportunity to investigate the charges in the letter. The regulation itself was promulgated on July 29, 1966. The Commission explained at the time that the 1966 regulation described already then existing EEOC practice. 31 Fed. Reg. 10269.

is 300 days.[7] Section 706(b) states in part that "[c]harges shall be in writing under oath or affirmation." The question here is whether the § 706(e)(1) deadline for filing is also a deadline for the § 706(b) verification.

Section 706(e)(1) establishes a deadline for filing, but makes no mention of verification. Section 706(b), on the other hand, which does require verification, sets no deadline by which that is to occur. The literal reading of these two provisions indicates that only filing, but not verification, is subject to the § 706(e)(1) deadline.

The meaning of the § 706(e)(1) filing deadline is particularly clear in the original version of Title VII adopted in 1964. In 1964, as now, § 706(e) required that "a charge . . . be filed" within a specified (then shorter) period of time. The verification requirement, however, was originally embodied in then § 706(a), which required the EEOC to conduct an investigation "[w]henever it is charged in writing under oath", that an unlawful employment practice had occurred. 78 Stat. 259. The EEOC's § 706(a) duty to investigate was triggered by a "charg[e] in writing under oath", but the § 706(e) filing deadline required only the filing of a "charge." The decision of the Fourth Circuit would, in effect, read into § 706(e) after the word "charge" the additional limitation "in writing under oath," a phrase Congress itself deliberately chose to use only in § 706(a). The action of Congress in 1972 rewording the verification requirement and moving it to § 706(b) did nothing to alter the meaning of *what* has to be filed under § 706(e).

If, as the Fourth Circuit believed, an allegation of discrimination is not a "charge" until and unless verified, a simple letter charging an employer with discrimination–one of the most common types of complaint the EEOC receives–would not be covered by the confidentiality provision of Title VII. Section 706(b) protects employers by directing that "[c]harges shall not be made public by the Commission." 42 U.S.C. § 2000e-5(b). If an unverified allegation of discrimination is not a "charge," the EEOC could release to the

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[7] The 300 day limit applies in states or localities which have appropriate agencies with authority to enforce employment discrimination laws or ordinances. *See* § 706(c).

press or post on its website every such letter it received and every unsworn Intake Questionnaire it prepared. Similarly, if § 706(b) were indeed definitional, then individuals who send unsworn letters of complaint to the EEOC would in some cases fall outside the protections of the anti-retaliation provision of § 704, which forbids reprisals against an individual because he or she "has made a charge . . . under this subchapter." 42 U.S.C. § 2000e-3(a).

The error underlying the decision below is highlighted by its insistence that even a written and verified allegation of discrimination "is not a charge" if it lacks any of the information required by the EEOC. (JA 37). The EEOC regulations provide that a charge "should" include considerable information, such as the full name and address of the alleged perpetrator, a list of the "pertinent dates," the approximate number of employees of the employer, and the date on which any charges were filed with a state or local enforcement agency. 29 C.F.R. § 1601.12(a). Many of the complaints received by the EEOC undoubtedly lack at least some of these details. It is not to be believed that Congress contemplated that a sworn allegation of discrimination would for want of some such detail "not [be] a charge" and thus not be sufficient to satisfy the charge filing deadline of § 706(e)(1). Yet it is difficult to separate the information requirement in § 706(b) from the verification requirement in the very same sentence.

Requiring that a charge be verified within the § 706(e)(1) deadline would establish for individuals seeking assistance from the EEOC a barrier which Congress clearly believed unduly burdensome. Where state or local law forbids discrimination also prohibited by Title VII, § 706(c) generally provides that an aggrieved individual cannot file a charge with the EEOC until at least sixty days "after proceedings have been *commenced* under the State or local law." 42 U.S.C. § 2000e-5(c)(emphasis added). Section 706(c) further states, however, that the state or local proceedings will be deemed to have been commenced by the filing of an unsworn written allegation, regardless of whether the terms of the applicable state or local law may itself require verification.

> If any requirement for the commencement of such proceedings is imposed by a State or local authority

> other than a requirement of the filing of a written and signed statement of the facts upon which the proceedings is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

It is difficult to believe that Congress intended to impose on individuals seeking to commence a federal administrative proceeding a requirement more onerous than Congress believed was reasonable for states and localities to require in order to commence a proceedings under state or local laws.

The court of appeals mistakenly believed that § 706(b) constitutes a *definition* of the "charge" that must be filed within the time period established by § 706(e)(1).

> [I]f a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, *it is not a charge*.

(JA 37)(emphasis added).[8] Section 706(b) does not define the meaning of a charge; rather, it imposes requirements on allegations which *are* charges. Section 706(b) provides that "charges shall be . . . under oath or affirmation," not that "charges *are* allegations under oath or affirmation."[9] If "charge" *meant* "allegation under oath or affirmation," then the terms of § 706(b) would provide that "an allegation under oath or affirmation shall be under oath or affirmation." A charge that is not yet under oath or affirmation is an unverified charge, not an "uncharge." A requirement that members of the armed

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[8] See JA 37: "In *defining* a charge, Congress chose to limit the EEOC's authority." (emphasis added).

[9] During the 1972 debates, Senator Allen proposed an amendment, drafted by Senator Ervin, that would have defined "charge" in this manner. Senator Allen's proposal would have inserted in Title VII the following language: "As used in this act, 'charge' shall mean an accusation of discrimination supported by oath or affirmation." 118 Cong. Rec. 4815 (1972). At the urging of Senator Williams, Allen agreed to replace that proposal with the language now found in § 706(b). *Id.*

forces wear uniforms does not mean that a soldier out of uniform is a civilian.

Title VII does indeed establish a standard regarding what must be filed within the charge filing period, but that requirement is to be found in § 706(e)(1), not § 706(b). Section 706(e)(1) requires the filing within the requisite time period of "a charge . . . alleging that an employer [or other entity] . . . has engaged in an unlawful employment practice." An allegation that an employer violated Title VII will suffice, however unartful that claim might be.[10] But an elegantly written, thoroughly detailed and fully verified allegation that Lynchburg College has a mediocre football team would not satisfy the charge filing deadline in § 706(e)(1) because it is not a charge of an unlawful employment practice.

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[10] The letter the EEOC treated as a charge in *Love v. Pullman Co.*, 404 U.S. 522 (1972), read as follows:

> This is a letter of inquiry to determine whether the circumstances I feel unfair and discriminatory are of such a nature as to come under your area of inquiry. I have taken the matter up with the state Civil Rights Commission locally and find that my objective was not understood. I am enclosing their letter of reply. According to it, they evidently believed I was endeavoring to become a Pullman Conductor. That is not the case.
>
> I have been a sleeping-car porter for 40 years, and an 'in-charge' porter for 20 of those years. My complaint is simply this: That when I am on duty as an 'in-charge' porter I have all the duties and responsibilities of a Pullman conductor, and receive only porter pay.
>
> I maintain that this is discrimination because of race and I believe that it is a matter which comes under the jurisdiction of your office. If there is further information which you require I will be pleased to give it to you.

Brief for Petitioner, No. 70-5033, Appendix B.

III. SECTION 1601.12(b) IS A REASONABLE INTERPRETATION OF § 706

A. Section 1601.12(b) is Consistent with the Liberal Treatment of Amended Charges and Complaints Under the National Labor Relations Act.

As this Court has often noted, Title VII was originally modeled after the National Labor Relations Act. *Teamsters v. United States*, 431 U.S. 324, 366 (1977). This Court has looked to practice and remedies under the NLRA in construing Title VII itself. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n. 11 (1982).

The NLRA requires that an unfair labor practice charge be filed within six months of the alleged violation. 29 U.S.C. § 160(b). Although the NLRA does not itself require that an unfair labor practice charge be made under oath, the National Labor Relations Board issued a regulation imposing such an obligation. 29 C.F.R. § 102.11. In *Union Starch & Refining Co. v. National Labor Rel. Bd.*, 186 F. 2d 1008 (7th Cir. 1951), both the company and the union objected that the employee who had filed the charge in question had not adequately sworn to the truth of his allegations.[11] The court concluded that the absence of the oath required by the Board's rules would not by itself invalidate the charge.

> The Board decided that [the employee's] references to the Bible upon signing the amended charges . . . were equivalent to an oath. We do not understand the Company or the Union was in any way misled or prejudiced by this procedure. . . . [E]ven if the Board erroneously construed its rules, the error was harmless. It did not affect the substantial rights of the Company or the Union, and should therefore be disregarded.

186 F. 2d at 1013.

[11] The charging party explained that it was against his religious beliefs to swear, but he "solemnized his signature with the Biblical reference to St. Matthew, Chapter 5, verses 34, 35, 36, and 37." 186 F. 2d at 1013.

More broadly, prior to 1964 parties who had filed unfair labor practice charges under the NLRA were regularly permitted to amend those charges to advance alternative legal claims or to name additional victims of the practice in question.[12] The courts expressly permitted such amendments to be filed after the expiration of the six month period.

> Anyone can file a charge. Many are filed by private citizens unskilled in the law or art of pleading. To require the strictness of formal pleadings in such cases would seriously impair the salutary purpose of the Act and the operations of the Board . . . . [A]n amended charge will be timely although filed more than six months after the occurrence of the alleged unfair labor practice if it relates to an unfair labor practice inherent in or connected with the original charge. In such cases, it will *relate back* to the filing of the original charge. The doctrine of relation back in pleading is well recognized in the general law. It should not be narrowly applied in a remedial act such as the one before us . . . .

Kansas Milling Co. v. NLRB, 185 F. 2d 413, 415 (10th Cir. 1950)(emphasis added)(footnote omitted).

In *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954), the original charge had alleged that the employer had violated §§ 8(a)(1) and 8(a)(3) of the NLRA by denying to a single non-union member certain payments that had been made to union members. More than a year after the filing of that charge, it was amended to include the additional allegation that a union security clause violated §§ 8(a)(1) and 8(a)(2). The complaint then issued by the General Counsel of the NLRB contained yet another a new allegation, that the payments in question had

[12] *E.g.*, *NLRB v. Millwrights' Local 2232*, 277 F. 2d 217, 219 (5th Cir. 1960); *NLRB v. United Brotherhood of Carpenters & Joiners*, 276 F. 2d 694, 696 (7th Cir. 1960); *Cosentino v. Local 28, Int'l Org. of Masters, etc.*, 258 F. 2d 648, 650 (8th Cir. 1959); *Pacemaker Corp. v. NLRB*, 260 F. 2d 880, 882 (7th Cir. 1958); *NLRB v. Raymond Pearson, Inc.*, 243 F. 2d 456, 457 (5th Cir. 1957); *Douds v. International Longshoremen's Ass'n*, 242 F. 2d 808, 809 (2d Cir. 1957).

been unlawfully denied to all nonunion members. This Court rejected the employer's contentions that

> inclusion of such employees who did not file charges is prohibited by the six-month statute of limitations period provided in § 10(b) of the Act. We agree with . . . the Board, and the court below that this charge *relates back* to the charges timely filed and thus the company was given adequate notice and was not prejudiced by the amendment.

347 U.S. at 34 n. 30 (emphasis added).

The courts repeatedly refused to restrict proceedings under the NLRA to the confines of the original charge.

> A charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit. Its purpose is merely to set in motion the machinery of an inquiry. . . . The responsibility of making that inquiry, and of framing the issues in the case is one that Congress has imposed upon the Board, not the charging party.

Labor Board v. Fant Milling, 360 U.S. 301, 307 (1959). Thus the Board itself was permitted to include in a complaint any violations that were unearthed in its investigation of the charge, even if not included in the original charge itself. "The purpose of the charges is not to define the issues to be tried with the precision that is sought normally in pleadings in law suits. . . . [I]t would hardly be consistent with the general investigatory nature of the action on the charge to confine the subsequent complaint to its allegations." *NLRB v. Kingston Cake Co.*, 191 F. 2d 563, 567 (3d Cir. 1951).[13]

The NLRB's regulations, like § 1601.12(a), required that a charge contain certain specified information. *Compare* 29 C.F.R. § 102.12 (NLRA) *with* 29 C.F.R. § 1601.12(a)(Title VII). The federal courts emphatically rejected contentions–accepted by the court of appeals below regarding a Title VII charge–that a charge under the NLRA was insufficient to confer jurisdiction on the NLRB if it lacked that required

[13] *See NLRB v. Kobritz*, 193 F. 2d 8, 15 (1st Cir. 1951).

information. *See e.g., Consumers Power Co. v. NLRB*, 113 F. 2d 38, 41-42 (6th Cir. 1940).

Section 1601.12(b) is consistent both with the *Union Starch* treatment of the NLRB's verification requirement and with the generally permissive practice under the NLRA regarding amendments to unfair labor practice charges.

B. Section 1601.12(b) Properly Assures that the Charge Filing Process Will Be Reasonably Accessible to Discrimination Victims

For almost three decades this Court has construed the Title VII charge-filing provisions to avoid the needless creation of technical obstacles that would encumber attempts by discrimination victims to obtain redress from the EEOC or the courts. The Court has enforced those specific limitations which are expressly spelled out in the statute, but has refused to add procedural barriers not "compelled by the plain meaning of the statutory language." *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n. 19 (1980). The construction of § 706 embodied in § 1601.12(b) is consistent with this longstanding principle of interpretation.

In *Love v. Pullman Co.*, 404 U.S. 522 (1972), the plaintiff sent a letter to the EEOC without first commencing proceedings with the relevant state fair employment agency as required by what is now § 706(c). Rather than rejecting the letter, the EEOC held it in "suspended animation," referred the matter to that state agency, and then formally filed the letter once the state had waived the opportunity to consider the matter. Since the Commission was willing and able to solve in this manner the problem created by Love's failure to utilize his state remedies, this Court could see

> no reason why further action by the aggrieved party should be required. . . . The [employer] makes no showing of prejudice to its interests. To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in

> which laymen, unassisted by trained lawyers, initiate the process.

404 U.S. at 526-27 (footnote omitted).

In *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), this Court construed § 706(e), which establishes two different charge filing deadlines: 300 days in a deferral state, and 180 days in a non-deferral state. Several circuits had held that a plaintiff could not take advantage of the 300 day period unless he or she had within 180 days of the asserted violation filed a charge with the state fair employment practices agency. *See* 447 U.S. at 814 n. 16. In rejecting that interpretation, this Court stressed that there was no

> *express* requirement that the state proceedings be initiated by any specific date . . . . [W]e do not believe that a court should read in a time limitation that Congress has not seen fit to include, . . . at least when dealing with 'a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'

Love v. Pullman Co. 447 U.S. at 816 n. 19 (emphasis added).

In *EEOC v. Commercial Office Products*, 486 U.S. 107 (1988), the complainant had initiated administrative proceedings with the wrong agency at the wrong time; although she was in a deferral state, the complainant filed her charge with EEOC, and had done so some 290 days after the alleged violation and 110 days after the deadline for filing with the state agency. Responding as it had in *Love*, the Commission quickly referred the matter to the state, obtained a waiver of state processing, and then filed the charge. In concluding that the EEOC had jurisdiction over the charge, the Court held that under § 706(c) a discrimination charge could be filed with a state agency even where the state's own charge filing period had expired. Because there was no "express" prohibition against the solution that had been fashioned by the EEOC, the Court "declined to create" a requirement that the state filing be timely under state law, stressing that "Title VII . . . is a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." 486 U.S. at 124. Justice O'Connor, although finding Title VII more ambiguous than the

plurality, agreed that "deference is particularly appropriate on this type of technical issue of agency procedure." 486 U.S. at 125. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 n. 13 (1979)(refusing to create an "additional procedural technicality" under the ADEA); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 395 n. 11 (1982).

The statutory language of Title VII creates no express requirement that a charge be verified prior to the end of the charge filing period. Thus § 1601.12(b), insofar as it permits post-filing verification, is entirely consistent with *Love*, *Mohasco*, and *Commercial Office Products*. Requiring complainants, on pain of dismissal, to verify charges prior to the end of the filing period would create precisely the type of additional procedural technicality this Court has consistently avoided in the absence of an express and unambiguous statutory command.

Section 1601.12(b) addresses a recurring and important practical problem in the Title VII administrative process. Although § 706(b) requires that a charge be made under oath or affirmation, most charging parties will not know of or anticipate that procedural requirement when they initially complain to the EEOC. Aggrieved individuals frequently make their first contact with the Commission by letter. *E.g.*, *Mohasco Corp. v. Silver*, 447 U.S. 807, 810 (1980); *Love v. Pullman Co.*, 404 U.S. 522, 523 (1972).[14] Because of the relatively short charge filing periods, a substantial number of these letters arrive towards the end of the period, and it will often be difficult or impossible for the EEOC in the days that may remain to elicit a verified charge from the complainant. These problems were particularly severe when Title VII was first adopted; the regular charge filing period was then only 90 days, there were far fewer deferral states in which the then 210

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[14] For other examples of such letters, *see Whiting v. Ski's Auto World Paint and Body Shop, Inc.*, 1999 WL 753997 (4th Cir.); *Tinsley v. First Union National Bank*, 155 F. 3d 435, 438 (4th Cir. 1998); *Simpkins v. Washington Metropolitan Area Transit Authority*, 1997 WL 702349 *3 (D.C. Cir.); *Tillman v. City of Boaz*, 548 F. 2d 592, 593 (5th Cir. 1977); *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 356 (6th Cir. 1969); *Georgia Power Co. v. EEOC*, 412 F. 2d 462, 266 (5th Cir. 1969).

day rule applied, and Title VII did not provide for any EEOC offices outside of Washington, D.C.

Even where it might be practicable for the Commission to hurriedly obtain a verification prior to the end of the charge period, a precipitous effort to do so would often be at odds with other provisions of Title VII. The underlying purpose of the verification requirement is to assure the accuracy of the charge by impressing on the charging party the importance of telling the truth. But that accuracy purpose would itself be compromised if the Commission were compelled in the waning days of a charge filing period to seek immediate verification of whatever a complainant had initially put in a letter. Laymen, however intensely they may believe themselves wronged, often will not understand which kinds of conduct are unlawful or relevant, or know how to categorize or characterize the types of discriminatory actions that may fall within the scope of Title VII's prohibitions.

Section 706(b) requires not only verification but also inclusion of such information as the Commission may require; where, as will frequently occur, a letter to the Commission does not contain all that information, further correspondence or phone calls will be needed to elicit the additional details. In such cases, precipitous solicitation by the EEOC of immediate verification would likely result in a charge that contains the verification, but lacks the completeness, required by § 706(b).[15]

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[15] A similar problem arises where individuals first contact the EEOC by telephone rather than by letter. The Commission staff will usually discuss the matter with the caller to ascertain if the complaint falls within the EEOC's jurisdiction. If the EEOC is the appropriate federal agency to handle the problem, the staff will next send the caller an intake sheet or questionnaire to be filled out in his or her own words. Once that has been returned, the staff may well call or meet with the individual to obtain additional information or clarification. When this process is complete, the staff will prepare a Form 5 charge for signature and verification by the complainant. This longstanding administrative process strikes a reasonable balance between the twin § 706(b) goals of completeness and verification.

As then Judge, later Solicitor General, McCree explained in *Blue Bell Boots, Inc. v. EEOC*, 418 F. 2d 355, 357 (6th Cir. 1969),

> the Congressional intent in requiring an oath is to prevent the harassment of respondents by reckless charges. . . . [T]his purpose can be served by requiring verification before action is taken by the Commission . . . . Such a construction recognizes the remedial nature of the statute and does not prejudice an unwary victim of discrimination by insisting upon a formal requirement which can be supplied before the respondent is brought into the picture.

There is no reason to believe that Congress, in framing the Title VII charge filing process, intended to depart from the informality that is the hallmark of federal administrative law. "The most important characteristic of pleadings in the administrative process is their unimportance. And experience shows that unimportance of pleadings is a virtue." 1 Davis, Administrative Law Treatise § 8.04, at 523 (1958). "It is difficult to imagine how the absence of an oath at the time the original charges was filed could . . . injur[e] [an employer.]" *Choate v. Caterpillar Tractor Co.*, 402 F. 2d. 357, 360 (7th Cir. 1968).

C. The Charge Filing Requirements of Title VII Should Not be Construed to Impose Procedural Requirements More Stringent Than Would be Applied by Courts to Parties in Civil Litigation

This Court's repeated insistence that the Title VII charge filing process be construed in a manner appropriate for laymen is consistent with the pre-Title VII decisions stressing that a charge under the National Labor Relations Act should not be subjected to the more stringent standards that would be appropriate for a civil complaint or other formal pleading. The Fourth Circuit's interpretation of § 706, however, has precisely the opposite consequence–it establishes for Title VII complainants a procedural barrier that assuredly would not be faced by a party in civil litigation.

The litigation practice most analogous to § 706(b) is the requirement in many jurisdictions that a complaint or other pleading be verified. For over a century, litigants who had initially filed unverified pleadings have been permitted to verify them at a later time. Such subsequent verifications have been routinely allowed by federal and state courts for complaints,[16]

[16] *RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wash. App. 265, 271, 864 P. 2d 12, 16 (1993)(lack of verification a "technical defect"); *United States v. $84,740 U.S. Currency*, 900 F. 2d 1402, 1405-06 (9th Cir. 1990)("complaint without verification may be amended to cure the defect"); *Pulliam v. Pulliam*, 163 Kan. 497, 500, 183 P. 2d 220, 227 (1947)(complaint "may be amended by a proper verification and . . . when the amendment is filed it will relate back to the original"); *Workman v. Workman*, 46 N.E. 718, 724, 113 Ind. App. 245 (1943); *Greene v. Union Pac. Stages, Inc.*, 182 Wash. 143, 145, 45 P. 2d 611, 612 (1945); see *United Farm Workers of America, AFL-CIO v. Agricultural Labor Relations Bd.*, 37 Cal. 2d 912, 694 P. 2d 138, 140, 210 Cal. Rptr. 453, 454-55 (1985)("the failure to verify a pleading–even where the verification is required by statute–is a mere defect curable by amendment. . . . Amendments may cure such a defect even when submitted after the statute of limitations has run on the time to file the original compliant, since verification of a complaint is not a jurisdictional requirement.")

petitions,[17] answers,[18] motions,[19] appeal notices,[20] and other documents.[21]

[17] *Miller v. Board of Assessors*, 91 N.Y. 2d 82, 86, 689 N.E. 2d 906, 908, 666 N.Y.S. 2d 1012 (1997); *Thomas v. Thomas*, 910 S.W. 2d 825, 827 (Mo. App. 1995)("verified amended pleadings may relate back to the original petition, thus conferring jurisdiction on the court"); *Oceana Apts. v. Spielman*, 164 Misc. 2d 98, 102, 623 N.Y.S. 2d 724, 727 (Civ. Ct. 1995)("unless a verification defect has been shown to be substantially prejudicial, petitions are amendable"); *Crystal Media, Inc. v. HCI Acquisition Corp.*, 773 S.W. 2d 732, 734 (Tex. Ct. App. 1989); *Stoltman v. Stoltman*, 170 Mich. App. 653, 657, 429 N.W. 2d 220, 222 (1988)("Imperfect verification of a pleading is not a jurisdictional defect and may be cured by amendment"); *Drury Displays, Inc. v. Board of Adjustment of the City of St. Louis*, 760 S.W. 2d 112, 113 (Mo. 1988)("verification can be supplied by amendment and relate[s] back to the time the petition was filed"); *Standard of Beaverdale, Inc. v. Hemphill*, 746 S.W. 2d 662, 664 (Mo. App. 1988)("The verification requirement is not so strict as to make the initial, unverified petition unsalvageable, and the verification relates back to the filing of the original petition"); *Estate of Shaffer v. Holland*, 203 Kan. 264, 270, 454 P. 2d 1, 6 (1969)(subsequent verification "dates back to the time of the original petition"); *Estate of Sessions v. First National Bank of Portland*, 217 Or. 340, 349, 341 P. 2d 512, 517 (1959)("An imperfect verification being only irregular and subject to being cured by amendment, the amendment relates back to the original verification"); *Lewis v. Connett*, 291 F. Supp. 583, 585 (W.D.Ark. 1968)(unverified habeas petition).

[18] *Bell v. State*, 234 Ga. App. 693, 695, 507 S.E. 2d 535, 538 (1998); *Wall v. Greene*, 321 Ill. App. 161, 52 N.E. 2d 303 (1943); *Bank of Dover v. Jones*, 95 S.W. 2d 92, 93 (Ark. 1936); *Kempner v. McMahan*, 296 P. 802, 802 (N.Mex. 1931); *Rex Red Ash Coal Co. v. Powers*, 290 S.W. 2d 1061, 1063 (Ky. App. 1927); *Baker v. Smith*, 135 Ga. 628, 70 S.E. 239 (1911); *Bank of Edgefield v. Farmers' Co-operative Mf'g Co.*, 52 F. 98, 101 (5th Cir. 1892).

[19] *Board of Com'rs of Cheyenne County v. Walter*, 83 Kan. 743, 112 P. 599, 600 (1911)(subsequent verification "related back to the original").

[20] *Drury Displays, Inc. v. Board of Adjustment of the City of St. Louis*, 760 S.W. 2d 112 (Mo. 1988); *United Farm Workers of America, AFL-CIO v. Agricultural Labor Relations Bd.*, 37 Cal. 3d 912, 694 P. 2d 138, 210 Cal. Rptr. 453 (1985).

[21] *Industrial State Bank of Houston v. Engineering Service and Equipment, Inc.*, 612 S.W. 2d 661, 663 (Tex. App. 1981)(plea of privilege); *State ex rel. Williams v. Jones*, 164 S.W. 2d 823, 179 Tenn. 206 (1942)(campaign expense reports); *Kuykendall v. Lambert*, 173 P. 657, 68 Okl. 258 (1918)(plaintiff's reply pleading); *Swearingen v. Howser*, 14 P. 436, 37 Kan. 126 (1887)(affidavit supporting attachment).

> Even if the statute requires verification, the filing of an unverified complaint will commence the action so as to toll the statute of limitations. Despite the requirement of verification, the law is definite and well settled that . . . [i]mperfect verification of a pleading is not a jurisdictional defect and is amendable under Rule 15 [of the Federal Rules of Civil Procedure].

1A Barron and Holtzoff, Federal Practice and Procedure, § 333, pp. 271 (1960). In federal bankruptcy proceedings, where verification is often mandated by Bankruptcy Rule 1008, parties have long been permitted to correct by amendment a missing or defective verification.[22]

Like the filing of a charge under § 706(e)(1), the filing of a complaint is the event which must occur prior to the expiration of a statute of limitations. "A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. Although the Federal Rules do not generally require verification,[23] they do–like § 706(b)–establish a number of requirements for complaints. A complaint, for example, "shall contain" a statement of the basis of federal jurisdiction, a "short and plain" statement of the claim, and a demand for the relief sought. Fed. R. Civ. P. 8(a). Averments of fraud or mistake "shall be stated with particularity." Fed. R. Civ. P. 9(b). Every complaint "shall contain a caption" setting forth certain information, and "all averments of claim . . . shall be made in numbered paragraphs." Fed. R. Civ. P. 10. And a complaint "shall be signed" and "shall state the signer's address and telephone number." Fed. R. Civ. P. 11.

It has never been suggested that Rules 8, 9, 10 and 11 *define* what constitutes a complaint within the meaning of Fed. R. Civ. P. 3. No one would seriously argue that the filing of

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[22] *E.g., In re Royal Circle of Friends Bldg. Corp.*, 159 F. 2d 539, 541 (7th Cir. 1947); *Harris v. Mills Novelty Co.*, 106 F. 2d 976, 978 (10th Cir. 1939); *Kattleman v. Madden*, 88 F. 2d 858, 865 (8th Cir. 1937); *Sabin v. Blake-McFall Co.*, 223 F. 501, 506 (9th Cir. 1915); *In re Miller*, 192 F. 730 (W.D.Iowa 1912); *In re Meuer*, 144 F. 445 (E.D.Pa. 1906).

[23] *But see* Fed. R. Civ. P., 23.1; Suppl. Rules for Certain Admiralty and Maritime Claims, Rule C(2).

an otherwise sufficient complaint within the applicable limitations period would not constitute the "filing [of] a complaint" under Rule 3 if the complaint lacked numbered paragraphs or omitted the phone number of the signing party or attorney. For decades since the original promulgation of the Federal Rules of Civil Procedure, plaintiffs have routinely and properly been permitted–despite the expiration of the applicable limitations period–to correct, by amendment or otherwise, complaints which failed in some respect to comply with those Rules.

The Rule 11 signature requirement is the provision most analogous to the § 706(b) verification requirement. The filing of even an unsigned complaint is sufficient to meet the statute of limitations. An unsigned complaint will be stricken only if it is not "corrected promptly after being called to the attention of the attorney or party." Fed. R. Civ. P. 11(a). Section 1601.12(b) treats an unverified charge in a manner similar to the treatment of an unsigned complaint under Rule 11. Under Rule 11, a highly experienced and well-paid attorney at one of the nation's most prestigious law firms, despite personal knowledge of the signature requirement, is permitted to correct after the fact his or her error in failing to sign a complaint; it is impossible to understand why complainants should not be permitted to make an analogous correction under § 706.

This Court's decision in *Becker v. Montgomery*, 121 S.Ct. 1801 (2001), confirms the reasonableness of § 1601.12(b). The appellant in that case had failed to sign the notice of appeal which he had timely filed in the district court. Fed. R. App. P. 1(a)(2) provides that such a filing "must" comply with district court practice, and Fed. R. Civ. P. 11 in turn states that any papers "shall" be signed. Even an unsigned notice of appeal, this Court held, was sufficient to satisfy the requirement that a notice of appeal be filed within 30 days of the judgment appealed from. The lack of signature did not mean that what Becker had filed was not a notice of appeal at all, but only that there was a "defect in [the] notice." 121 S.Ct. at 1806. If, as this Court held in *Becker*, such defects are "curable" when they occur in notices filed in a United States District Court, 121 S. Ct. at 1806-07, they are surely curable when they occur in charges filed with the EEOC.

Under the Federal Rules of Civil Procedure there are only two sorts of amendments to a complaint that cannot relate back to the original filing date. First, relation back is not permitted where the amendment names a new defendant, except where the original designation of the defendant was a mistake of which the proper defendant was aware. Fed. R. Civ. P. 15(c)(3). Second, a plaintiff cannot after the expiration of the limitations period raise a new claim that did not "ar[i]se out of the conduct, transaction, or occurrence set forth . . . in the original pleading." Fed. R. Civ. P. 15(c)(2). But where, for example, a timely complaint seeks redress for a particular injury, the complaint can after the limitations period has run be amended to allege a different factual theory as to why the defendant was culpable. *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574, 581 (1945). These are precisely the types of distinctions made by the EEOC regulations, which deem a charge "sufficient" if (but only if) it is "sufficiently precise to identify the parties and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).

Similarly, in this Court a certiorari petition actually filed within the requisite 90 days after entry of the judgment appealed from is sufficient to meet that jurisdictional deadline even if the petition is defective in form or content under Supreme Court Rules 14, 33 or 34. These Rules establish requirements for, but like § 706(b) do not define, a certiorari petition. A petition inadvertently printed with a red cover, or without a table of contents, is still a certiorari petition. Where a timely petition does not conform with the Supreme Court Rules, the petitioner will ordinarily be advised by letter of the deficiency, and be accorded an additional 60 days to submit a corrected petition. Sup Ct. R. 14(5).

Rule 15 of the Federal Rules of Civil Procedure provides that leave to amend "shall be freely given when justice so requires." In construing Rule 15 in the year before the enactment of Title VII, this Court observed, "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities." *Foman v. Davis*, 371 U.S. 178, 181 (1963). Congress assuredly intended that Title VII be administered in a similar spirit.

CONCLUSION

For the above reasons, the decision of the Court of Appeals for the Fourth Circuit should be reversed.

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In The

Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

This Court granted *certiorari* on the following question:

I. Is 29 C.F.R. §1601.12(b), which provides that a Title VII "charge may be amended to cure technical defects or omissions, including the failure to verify the charge," invalid?

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STATUTE AND REGULATION INVOLVED

Sections 706(a), (b) & (e) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5, provide:

> (a) Power of Commission to prevent unlawful employment practices
>
> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
>
> (b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges…
>
> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management

committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires....

....

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system.

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the

proceedings under State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The EEOC regulation in question, 29 C.F.R. §1601.12, provides:

Contents of charge; amendment of charge.

(a) Each charge should contain the following:

(1) The full name, address and telephone number of the person making the charge except as provided in §1601.7;

(2) The full name and address of the person against whom the charge is made, if known (hereinafter referred to as the respondent);

(3) A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices: See §1601.15(b);

(4) If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be; and

(5) A statement disclosing whether proceedings involving the alleged unlawful employment practice have been commenced

before a State or local agency charged with the enforcement of fair employment practice laws and, if so, the date of such commencement and the name of the agency.

(b) Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein. Such amendments and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred.

STATEMENT OF THE CASE

Lynchburg College ("the College") hired Leonard Edelman as an Assistant Professor of biology in August 1993. Three years later, in the fall of 1996, Edelman filed an application for tenure—the award of a lifetime employment contract at the College. As is customary in such cases, his application was considered independently by his teaching colleagues, the College administration, and ultimately the College's Board of Trustees. Though supported by his faculty colleagues, his application was not supported by the administration and was rejected by the Board of Trustees on May 23, 1997.[1] While notice of the Board's action was sent to Edelman on the day the decision was made, Edelman claims that he did not receive the notice until June 6, 1997.

Edelman filed a lawsuit against the College alleging that he had been subjected to discrimination during the course of his employment (Count One) and denied tenure and retaliated against by the College (Count Two) because of his gender (male), ethnicity (Polish), religion (Jewish), and age (47) "in violation of Title VII of the Civil Rights Act of 1964, as amended; and other civil and criminal statutes." Edelman also asserted claims under Virginia common law for negligent retention (Count Three), breach of contract (Count Four), intentional infliction of emotional distress (Count Five), and defamation (Count Six). JA 6-21.[2]

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[1] As is customary at the College, Edelman was granted a one-year terminal teaching contract following the denial of tenure. This contract lapsed by its own terms in May 1998.

[2] Edelman initially filed his lawsuit against the College in state court, alleging state law claims of wrongful termination, breach of contract, and intentional infliction of emotional distress. The College removed the action to federal court after Edelman amended his complaint to assert causes of action under Title VII, and to add state law claims for defamation and negligent retention.

As a preliminary step in making his Title VII claims, Edelman had faxed a letter to the EEOC on November 14, 1997. JA 47-53. The letter was a "request to file a charge of employment discrimination against Lynchburg College in regards to their personnel decisions concerning me during January-June 1997 culminating in the denial of my continued employment at the college." JA 48. In the letter, Edelman asserted that his case "is one of gender-based employment discrimination, exacerbated by discrimination on the basis of my family's national origin and religion." JA 52. He did not mention age discrimination or Title VII retaliation.[3] Edelman concluded his letter by stating that the EEOC would shortly be hearing from his attorneys concerning his claim. JA 53.[4]

Edelman's November 14 letter was not sworn to under oath, either at the time it was sent to the EEOC or at any time thereafter. The EEOC did not assign a charge number to the letter. The EEOC did not send the letter to the Virginia Council on Human Rights (VCHR), the Virginia state deferral agency. Nor did the EEOC send to Lynchburg College either a copy of the letter or a notice of a charge of discrimination based on the letter.[5]

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[3] Edelman has not mentioned the district court's dismissal of his age discrimination and Title VII retaliation claims in any of his briefs on appeal. It appears therefore that he has abandoned these claims. This is perhaps because these claims exceed even the scope of Edelman's November 1997 letter to the EEOC, and were therefore never properly asserted in his lawsuit even under Edelman's current theory of the case. *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 962-63 (4th Cir. 1996).

[4] Professor Edelman has at all times been represented both before the EEOC and in the courts by at least two law firms. He is therefore a most unlikely representative for the interests of the uneducated, unrepresented victims of discrimination he seeks to champion on this appeal.

[5] In fact, one of Edelman's two attorneys specifically asked the EEOC not to send Edelman's formal charging documents to the College

The EEOC responded to Edelman's November 14 letter in a December 3, 1997 letter to him stating that "additional information is needed before we can pursue this matter," urging Edelman to schedule an interview to provide more information "as soon as possible because a charge of discrimination must be filed within the time limits imposed by law...." JA 56-57. The EEOC further admonished Edelman that if he did not contact the EEOC to schedule an interview, the agency would assume he "did not intend to file a charge of discrimination." *Id.*

The EEOC sent Edelman an appointment notice on February 17, 1998 scheduling an interview for March 3, 1998, reminding him that he had "180 days from the date of the alleged violation to file a charge" with the EEOC. JA 58-59.[6]

On March 18, 1998, the EEOC sent Edelman a letter enclosing an EEOC Form 5 Charge of Discrimination based on the information he had provided in his March 3, 1998 interview. JA 60-61, 62-63. This was 285 days after the June 6, 1997 accrual date alleged by Edelman, and 15 days

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until Edelman had a "personal interview" with an EEOC investigator. JA 54.

[6] Claimants have 180 days to file charges of discrimination with the EEOC in states that do not have agencies with "authority to grant or seek relief" from discriminatory employment practices. 42 U.S.C. §2000e-5(e)(1). Claimants have 300 days to file charges with the EEOC in states having such agencies. *Id.* These states are sometimes referred to as "deferral" states. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107 (1988).

Subsequent to the EEOC's February 17, 1998 letter to Edelman, Virginia was adjudicated to be a "deferral" state in *Tinsley v. First Union National Bank*, 155 F.3d 435, 440 (4th Cir. 1998), decided on September 2, 1998. Edelman therefore had 300 days from the accrual date of June 6, 1997—until April 2, 1998—to file his charge of discrimination with the EEOC.

prior to the statutory deadline for filing a charge with the EEOC. The Charge of Discrimination form alleged gender discrimination and nothing else. JA 63.[7] The transmittal letter urged Edelman to make and initial any "corrections or additions" on the Form 5 charge. Despite this adjuration, Edelman did not check any of the boxes on the Form 5 charge indicating that he was making a discrimination claim on any grounds other than sex discrimination. JA 63. He added nothing to the body of the draft Charge of Discrimination mentioning the religion or national origin allegations he had made in his November 14, 1997 letter to the EEOC, and which he later asserted in his lawsuit against the College. Indeed, in the Charge of Discrimination, Edelman did not mention his November 14, 1997 unsworn letter to the EEOC at all. *Id.*

The March 18, 1998 transmittal letter from the EEOC also instructed Edelman to sign the charge "in the bottom left hand block" of the Form 5, which contained the affirmation of the truth of the charge required by Title VII. JA 60, 63. The letter went on to state that if Edelman did not return the Form 5 Charge of Discrimination to the EEOC, his charge would "not be processed." JA 61.

Edelman did not file his verified Charge of Discrimination with the EEOC until almost a month later, on April 15, 1998 (JA 67)—313 days after the June 6, 1997 accrual date. The charge was then assigned a charge number by the EEOC, and on April 21, 1998, the EEOC forwarded the charge to the College for a response. JA 64-66. The EEOC never sent Edelman's unsworn November 14 letter to the College during the course of processing Edelman's

[7] The EEOC's notes from Edelman's March 3, 1998 interview with the agency state "religious and national origin discrimination discounted. Do not include as a basis." JA 88.

complaint.[8] Moreover, the EEOC never sent a copy of the letter to the VCHR.[9] The EEOC issued a right-to-sue notice to Edelman on March 29, 1999, and Edelman's Title VII lawsuit followed.

The district court dismissed Edelman's Title VII claims on the grounds that Edelman had failed to file his charge of discrimination within the 300-day limitations period set out in Title VII.[10] The district court acknowledged that Edelman had written the letter to the EEOC on November 14, 1997, within the limitations period, but ruled that the record demonstrated that neither Edelman nor the EEOC had proceeded as if they regarded that letter to be a "charge" within the meaning of Title VII:

- The letter was never verified, as is required for "charges" by Title VII (JA 28);

- The EEOC follow-up letters to Edelman had indicated his letter was not sufficient to constitute a charge (*Id.*);

[8] The letter was made available to the College in response to a Freedom of Information Act request only after the EEOC had closed its administrative file and issued Edelman a right-to-sue.

[9] It appears from the record that the EEOC may have sent a copy of Edelman's Form 5 Charge of Discrimination to the VCHR on April 21, 1998, 319 days after the alleged discrimination. JA 67-68. However, VCHR records indicate that the charge was not received and logged in with that agency as a "dual-filed" charge until June 4, 1998, after the College had filed its response to the charge, including a challenge to its timeliness. Court of Appeals JA 59.

[10] After dismissing the Title VII claims, the federal district court remanded Edelman's state law claims to the Virginia Circuit Court for the City of Lynchburg. Those claims, including Edelman's breach of contract and wrongful discharge claims, were dismissed by the Lynchburg Circuit Court as inadequate as a matter of state law. JA 91-93. The Virginia Supreme Court found no reversible error in the Circuit Court's judgment and refused Edelman's petition for appeal. JA 94.

- The EEOC never served the letter or a notice of the letter either on the College or the Virginia Council on Human Rights, as is required for "charges" by both Title VII and EEOC regulations (*Id.*);[11]

[11] The EEOC regulation at 29 C.F.R. §1601.14 provides in pertinent part that:

> [w]ithin ten days after the filing of a charge in the appropriate Commission office, the Commission shall serve respondent a copy of the charge, by mail or in person, except when it is determined that providing a copy of the charge would impede the law enforcement functions of the Commission. Where a copy of the charge is not provided, the respondent will be served with a notice of the charge within ten days after the filing of the charge. The notice shall include the date, place and circumstances of the alleged unlawful employment practice. Where appropriate, the notice may include the identity of the person or organization filing the charge.

The EEOC regulation at 29 C.F.R. §1601.13(a)(4) provides in pertinent part:

> (i) Where any document, whether or not verified, is received by the Commission as provided in §1601.8 which may constitute a charge cognizable under Title VII or the ADA, and where the FEP agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:
>
> (A) All such documents shall be dated and time stamped upon receipt.
>
> (B) A copy of the original document shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or, where the FEP agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

- The EEOC never assigned a charge number to the letter (*Id.*); and

- No reference was made to the letter in the Charge of Discrimination filed by Edelman with the EEOC on April 15, 1998 (*Id.*).

On this basis, the district court ruled that 29 C.F.R. §1601.12(b), the EEOC regulation allowing "technical" amendments to a charge, including verification, to relate back to the initial filing date of the charge was inapplicable in this case, since the "November 14, 1997 letter did not constitute a charge" to which the April 15, 1998 charge could relate back. JA 28-29.[12] The validity *vel non* of the EEOC regulation was simply irrelevant to the outcome of the case.[13]

[12] In so ruling, the district court necessarily rejected the after-the-fact assertion in the declarations filed in the district court by the EEOC asserting that the agency had regarded Edelman's November 14, 1997 letter to be a "minimally sufficient charge." JA 78-82. The EEOC's own conduct during the administrative process belied that assertion.

The finding by the district court that the November 14, 1997 letter was not a "charge" because neither Edelman nor the EEOC treated it as such was not appealed, either to the court of appeals or to this Court, and therefore would not be open to relitigation on remand. See *Agostini v. Felton*, 521 U.S. 203, 236 (1997), *citing Messinger v. Anderson*, 225 U.S. 436, 444 (1912). The EEOC's suggestion that the College should be free to argue this as an alternative ground of decision on remand is therefore puzzling, if not disingenuous. The College has already done so, and prevailed on that ground.

[13] It is for this reason that this case is an inappropriate vehicle for review of the validity of the EEOC regulation. The College reiterates the position set out in its brief in opposition to *certiorari* and urges the Court to dismiss the writ as improvidently granted. As this Court has noted, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Export,*

The district court also rejected Edelman's estoppel argument based on the statement by one of his lawyers in a November 26, 1997 letter to the EEOC (JA 54-55) that counsel "understood" that any charge subsequently filed by Edelman would relate back to November 14, 1997. This letter was never responded to by the EEOC. As the district court noted, a party's statement as to what the party "understands" as to the filing date does not trump the actual requirements of Title VII. JA 29. It is significant that the EEOC did not say even in its post-hoc declarations that it had ever affirmed counsel's "understanding." JA 78-82.

The district court's ruling was affirmed by the Court of Appeals for the Fourth Circuit. The majority of the panel affirmed on the grounds that the EEOC regulation allowing relation-back of "technical" amendments to charges was invalid to the extent it could be read as allowing verification of a charge after passage of the statutory limitations period.[14] The majority reasoned that

> [w]hile Congress expressly delegated to the EEOC the power to delineate the form and content of the charge, it did not give the EEOC authority to tamper with the oath or writing requirements. Nor did Congress give the EEOC authority to alter the limitations period. On the contrary, the statute affirmatively and plainly established the time period within which a charge must be filed ....Because a charge requires verification...and because a charge must be filed within the limitations period..., it follows that a charge must be verified within the limitations period. Thus, to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII (citations omitted).

JA 37.

While Judge Luttig felt the majority's construction of the statute was "the better interpretation" (JA 46), he was "uncomfortable" with ruling that the EEOC regulation was invalid, in view of *Chevron's* requirement of mandatory judicial deference to "plausible" agency interpretations of ambiguous statutory terms. Judge Luttig would have affirmed on grounds essentially identical to that of the district court: that on the facts of this case, neither Edelman nor the EEOC treated Edelman's unsworn November 14, 1997 letter as a charge to which the late-filed sworn charge could relate back. JA 45.

This Court granted *certiorari* solely on the issue whether the EEOC regulation is valid.

SUMMARY OF ARGUMENT

The plain meaning of the statute in this case is that EEOC charges must be timely filed in writing and under oath, and served on employers within ten days of filing. This reading of the statute is supported by its language, the context in which it is used, the broader context of the statute

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Inc., 359 U.S. 180, 184 (1959). *Accord*, *Belcher v. Stengel*, 429 U.S. 118 (1976).

[14] Judge Beezer's opinion for the majority erroneously stated that the College had conceded that if the EEOC regulation was valid, Edelman's charge was timely. The College made and makes no such concession. On the contrary, the College does not believe the validity *vel non* of the EEOC regulation is outcome-determinative in this case for the reasons stated by the district court, by Judge Luttig on appeal, and by the College in its brief in opposition to *certiorari*.

as a whole, and by its legislative history. Congress did not authorize the EEOC to alter these statutory requirements. By promulgating a regulation that allows the "relation back" of oaths, thus relaxing the limitations period and effectively eliminating the prompt notice requirement in the statute, the EEOC has gone considerably beyond its statutory authority to establish procedures for processing charges of discrimination. Rather than merely establish procedures, it has promulgated a regulation that upsets the statutory scheme established by Congress in Title VII, and is contrary to the statute's plain meaning.

The regulation is therefore not entitled to legislatively-mandated deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), or under the judicially-developed norms enunciated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and most recently in *U.S. v. Mead Corp.*, 121 S.Ct. 2164 (2001).

Equitable estoppel principles can be used to ameliorate any situations where, unlike this case, a strict adherence to the statutory charge requirements and filing deadlines would lead to unduly harsh results. The court of appeals ruling should therefore be affirmed.

ARGUMENT

I. THE EEOC REGULATION IS INVALID BECAUSE IT IS INCONSISTENT WITH THE PLAIN MEANING OF THE STATUTE.

The first step in assessing the validity of any agency regulation, regardless of the "deference" test used, if any, is to determine the meaning of the statute or statutes upon which the regulation rests. See *U.S. v. Mead Corp.*, 121 S. Ct. at 2174; *Chevron,* 467 U.S. at 842-843.

Section 706 of the Civil Rights Act of 1964 as amended in 1972 (the "Act" or "Title VII") sets out the requirements for filing charges of discrimination with the EEOC. The statute requires that "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." Section 706(b) of the Act, 42 U.S.C. §2000e-5(b). Charges must be filed within a certain period of time "after the alleged unlawful employment practice occurred," that period being 300 days in states, like Virginia, having "a State or local agency with authority to grant or seek relief" from alleged unlawful employment practices. Section 706(e)(1) of the Act, 42 U.S.C. §2000e-5(e)(1). Finally, the statute requires that the "notice of the charge (including the date, place and circumstances of the alleged unlawful practices) shall be served upon the person against whom such charge is made within ten days" of filing with the EEOC. Sections 706(b) & (e)(1) of the Act, 42 U.S.C. §2000e-5(b) & (e)(1).

Any ordinary lay person reading §706 of the Act would conclude that charges of discrimination must be filed with the EEOC in writing, under oath, within the appropriate time limit, and served on the employer within ten days thereafter. The average intelligent reader would most assuredly not conclude from the statutory language that the charge did not have to be in writing and under oath at the time it was filed, or that the charge did not have to be served on the employer within ten days of the filing. Yet this is exactly the interpretation the petitioner and the EEOC would have this Court give the statute, by giving the word "charge" different meanings in subsections (b) and (e), and in different sentences within subsection (e) of Section 706 of the Act. Petitioner's proposed construction is contrary to the plain meaning of the statute.

A. The EEOC Regulation Conflicts With The Plain Meaning of the Statute.

This Court has taught that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Congress spoke plainly when it enacted the 1972 amendment to §706(b) of Title VII, specifying that "[c]harges shall be in writing under oath or affirmation." "Shall" is a word of command. Therefore the plain language of this portion of the statute, standing alone, requires that a "charge" be both in writing and under oath or affirmation.

After the conjunction "and," §706(b) of the Act separately requires, again through use of the word "shall," that charges "contain such information and be in such form as the Commission requires." This phrase creates a statutory "gap" and delegates authority to the EEOC to specify the informational content and form of charges, which the EEOC has done in subsection (a) of 29 C.F.R. §1601.12. There is, however, no "gap" for the EEOC to fill in the first portion of the statutory command. Instead, the statute plainly requires that in order to constitute a charge, a complaint must be in writing under oath or affirmation. There is no mention of a role for the EEOC in interpreting or elaborating upon this requirement, nor is there a need for one, as the requirement is simple and self-explanatory.

Moreover, the context of the language supports a consistent reading of the term "charge" within §706. Section 706 is the first section of Title VII dealing with the procedures to be followed when filing a charge. Subsection 706(b) is the first of the subsections within §706 to use the word "charge"; therefore, it is logical that Congress would

also place the defining characteristic of the word "charge" within this subsection. Section 706 of the Act specifies in subsection (b) that charges be in writing under oath and provides in subsection (e) that a "charge under this *section* [706] shall be filed within one hundred and eighty days." 42 U.S.C. §2000e-5(e) (emphasis added). Rather than allowing the inference that a "charge" may be defined differently in each subsection, as suggested by the petitioner and the EEOC, Congress used the word "section" rather than "subsection" to signify that "charge" has the same meaning throughout §706. The petitioner's argument that subsections (b) and (e) are not linked and should not be interpreted consistently defies logic and bends the statute out of shape.

This Court has held with regard to this very section of the Act that it would be unreasonable to give a word "two different meanings in the same section of the statute." *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). In *Mohasco*, the question was whether Congress intended the word "filed" to "have the same meaning in subsections (c) and (e) of § 706 of the Civil Rights Act of 1964." *Id.* at 809. There, the *pro se* petitioner and the EEOC argued that giving the word "filed" the same meaning in both subsections would add a technical obstacle to the filing of a charge by an unrepresented complainant.

In rejecting the petitioner's (and EEOC's) argument in *Mohasco*, the Court followed the same course the College believes it should follow here. It first looked at the plain meaning of the statutory language. It then reviewed the legislative history of the 1964 Act and the 1972 amendments to the Act to see if Congress intended the statute to have a different, non-obvious meaning. Finally it considered and rejected policy arguments in favor of a non-obvious meaning. *Mohasco*, 447 U.S. at 815.

In *Mohasco*, the employer had discharged an employee on August 29, 1975. On June 15, 1976—291 days later—the employee sent a letter to the EEOC claiming he had been discharged due to religious discrimination. Since §706 of the statute prohibits filing a charge with the EEOC in a deferral state "before the expiration of sixty days after proceedings have been commenced" with the State deferral agency, "unless such proceedings have been earlier terminated," the district court ruled that the charge was late when filed with the EEOC, because it was filed later than 240 days after the discrimination alleged.[15]

The Court of Appeals for the Second Circuit reversed the district court, ruling that even though the charge was filed late according to the literal terms of the statute, it should nonetheless be ruled timely in view of the "overriding purpose of the Act," and in view of an EEOC regulation, 29 C.F.R. §1601.12(b)(1)(v)(A) (1977) which provided that the EEOC would consider a charge to be "filed" with the EEOC on the 300th day following the alleged discrimination in a deferral state, unless the EEOC had been notified of the earlier termination of State or local proceedings by the deferral agency. In reaching this result, the court of appeals had to give the word "filed" in §706(e) and (c) two different meanings, deeming a charge to be "filed" for purposes of §706(e) when received by the EEOC, as provided in the EEOC regulations, and to be "filed" as required by §706(c) only when the state deferral period had ended.

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[15] There was apparently no worksharing agreement between the EEOC and the New York deferral agency at the time, whereby the state agency designated the EEOC as its agent for receipt of charges, and automatically waived and terminated the 60-day deferral period established by Title VII. See *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 112. Congress had authorized the EEOC to enter into these worksharing agreements in §709(b) of the Act, 42 U.S.C. §2000e-8(b). The EEOC has used them extensively, especially since the decision in the *Commercial Office Products* case.

This Court reversed the court of appeals. Writing for the majority, Justice Stevens reasoned that giving the word "filed" two different meanings within the same section of the statute made no sense linguistically, and would alter the balance struck in the procedural scheme set out in the statute, as informed by its legislative history. The Court rejected the suggestion that the EEOC had the power to "interpret" the statute in a manner that would "supersede the language chosen by Congress." *Mohasco*, 447 U.S. at 825.

The same reasoning applies to this case. It makes no sense linguistically that Congress would have used the term "charge" to mean different things in the same section of the statute, as urged by the petitioner and the EEOC. The "charge" that "shall be filed" within the statutory time limit and "shall be served" on the employer within ten days of filing is self-evidently the same "charge" that "shall be in writing under oath." This was found to be the plain meaning of the statute by the court below.

In rejecting the argument for construing "filing" to have two different meanings in §706, this Court explained in *Mohasco* that

> [w]e believe that a lay person [reading §706] would be more apt to regard the general obligation of filing within 180 days as the standard of diligence he must satisfy, and that one who carefully read the entire section would understand it to mean exactly what it says.

Mohasco, 447 U.S. at 825. Here, a lay person need only look at the full text of §706 to find that a charge "shall be in

writing and under oath" and shall be filed within certain time limitations.[16]

B. The Legislative History Supports The Plain Meaning Of The Statute.

Although this Court has often noted there is no need to consider the legislative history of Title VII if the literal reading of the statute does not lead to "absurd or futile results," *Mohasco*, 447 U.S. at 818, *accord, Sutton v. United Airlines*, 527 U.S. 471, 482 (1999), the legislative history of §706 of the Civil Rights Act of 1964 as amended in 1972 supports the straightforward interpretation of the statutory language adopted by the court of appeals in this case.

The current language of §706 of the Act is the product of an amendment offered by Senators Allen and Ervin during the floor debate over the Senate version of the Equal Employment Opportunities Act of 1972 (S. 2515). The original version of S. 2515 did not contain the requirement that EEOC charges be verified, providing only that a charge be written.[17] When questioned about this

[16] This basic information can, and should, be provided by the EEOC to potential claimants when they first contact the agency, a procedure which would eliminate many of the problems unrepresented claimants may have experienced in seeking to comply with the statutory requirements. The EEOC does not routinely do this now, though it would be simple to do so. As acknowledged in its *amicus* brief, the EEOC sends those who first contact it by telephone a lengthy questionnaire, which does not inform claimants of either the applicable time limit or oath requirement. EEOC Brief at p. 24 n.14. These questionnaires do not contain a blank for a verified signature, though they easily could. Also, EEOC Form 5, although it contains a blank for a verified signature, does not indicate the applicable time limit, possibly leaving many claimants unaware of the deadline they must meet in returning the charge form. JA 62.

[17] STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 1ST SESS., PROPOSED

omission during floor debate, Senator Williams, the bill's major proponent in the Senate, stated that he did not know why the oath requirement had been omitted, essentially acceding to Senator Allen's suggestion that the omission was due to mere inadvertence.[18]

Senator Allen proposed an amendment curing the omission by adding a separate subsection to §706 of the bill providing that "[a]s used in this act, the term 'charge' shall mean an accusation of discrimination supported by oath or affirmation."[19] Senator Allen stated that this amendment would simply preserve what he believed to be the existing requirement under the 1964 Act that charges be under oath.[20]

EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971 at 34 (Comm. Print 1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1971 (1972) (section-by-section analysis of Equal Employment Opportunities Enforcement Act of 1972).

[18] 118 CONG. REC. 2182-83 (1972) (Senate, Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1672 (1972).

[19] 118 CONG. REC. 2182-83 (1972) (Senate, Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1672 (1972). Senator Ervin had authored the amendment.

[20] Section 706(a) of the 1964 Act provided in pertinent part that:

> [w]henever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that

Senator Williams did not oppose preserving the oath requirement, but preferred keeping it in the same subsection of §706 of the bill where it had been located in the original Civil Rights Act of 1964. Senator Allen responded that he thought it best to place the definition in a separate subsection, since there were several subsections of §706 that referred to a "charge," and he wanted "one coverall, blanket statement" defining that term, avoiding the necessity to amend the bill in each of the 4 or 5 subsections that referred to a "charge." Senator Williams responded by proposing that this could be accomplished simply by placement of the oath requirement "at the very beginning" in §706(b): "charges shall be in writing under oath or affirmation…." 118 Cong. Rec. 2182-83 (1972).[21] This amendment was

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such charge shall not be made public by the Commission….

Prior to the 1972 amendments, the Act's provision concerning oaths could be read as merely "prefatory language," rather than a "clearly stated statutory prerequisite." *Vason v. Montgomery*, 240 F.3d 905, 907 n.2 (11th Cir. 2001) (citations and internal quotation marks omitted). The amendment under discussion eliminated this possible interpretation. It should be noted that several of the principal cases upholding the validity of the EEOC regulation to the extent it allows verification of a charge after expiration of the limitations period are based on this earlier version of the statute. See *Weeks v. Southern Bell Telephone & Telegraph Company*, 408 F.2d 228 (5th Cir. 1969); *Georgia Power Company v. Equal Employment Opportunity Commission*, 412 F.2d 462 (5th Cir. 1969); *Blue Bell Boots, Inc. v. Equal Employment Opportunity Commission*, 418 F.2d 355 (6th Cir. 1969); *Choate v. Caterpillar Tractor Company*, 402 F.2d 357 (7th Cir. 1968).

[21] The exchange between Senators Allen and Williams reads as follows:

> Mr. Allen. No sir. The amendment adds a new section at the end of section 4, and it is between lines 19 and 20 on page 50 of the bill. It merely states that the word "charge" as used in the act shall be a charge supported by oath or affirmation.

adopted by voice vote, *Id.*, and survived the conference committee to be enacted into law. In refining the language of §706 of the bill, it is clear that Senators Allen, Ervin and Williams all had the understanding that the term "charge" would have a common meaning throughout the statute.

> Mr. Williams. I wonder if the Senator would refer to the bill at page 34, and whether this would not be the place to make the bill conform to present law.
> Mr. Allen. The only reason we did not put it there would have been because four or five subsections start off with reference to a charge, and it would have been necessary to amend the bill at about four or five places, whereas if we add one coverall blanket statement it would cover the matter without trying to amend it at four or five different points, and possibly not covering every one.
> Mr. Williams. The present law makes the requirement in one place, and it is in section 706.
> Mr. Allen. Yes.
> Mr. Williams. "Whenever it is charged in writing under oath." I do not know why it was taken out of the bill, but I would think that would be the place to put it back.
> Mr. Allen. As I stated, if it were put back, it would also have to be put back on page 35, subsection (c), where it refers to the cases of a charge; it would also have to be put on page 36, subsection (d) where it refers to the case of a charge; it would also have to be put on page 37, subsection (e) where it refers to the case of a charge.
> Mr. Williams. If the Senator will yield further, if it could be done in one place, it probably would be best to do it in section 706(b) where the requirement would be put at the very beginning. That would be on line 21, page 34, of the bill before the Senate.

118 CONG. REC. 2182-83 (1972) (Senate Feb. 21), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972-73 (1972).

The 1972 amendments to Title VII also made several other changes pertinent to filing charges with the EEOC. In the first place, the 1972 amendments extended the basic time period for filing a charge with the EEOC from 90 to 180 days, and from 210 to 300 days in deferral states. Congress also added a requirement that the EEOC notify employers within ten days of the filing of charges,[22] deploring the long delays in notification under the 1964 Act as violations of the legitimate rights of employers.[23]

Taken together, the 1972 amendments reflected a congressional compromise with respect to charge filing requirements: Congress substantially lengthened the time for filing charges, but provided that the oath or affirmation was an essential element of a "charge," and required that "charges" be served on employers within a short time after filing. This legislative history confirms a congressional judgment that "most genuine claims of discrimination would be promptly asserted and that the costs associated with

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[22] The 1964 Act had specified no time limit for providing respondents with notice of charges against them. See note 20, *supra*.

[23] H.R. CONF. REP. NO. 92-899, 92D CONG., 2D SESS. 1 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1822 (1972); STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 SHOWING CHANGES MADE BY PUBLIC LAW 92-261 APPROVED MARCH 24, 1972 at 8 (Comm. Print 1972), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT ACT OF 1972 at 1899 (1972). The 10-day notice requirement was added by the Senate Committee on Labor and Public Welfare. *Compare* STAFF OF SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONGRESS, 1ST SESS., PROPOSED EQUAL EMPLOYMENT OPPORTUNITIES ENFORCEMENT ACT OF 1971 at 34, (Comm. Print 1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 1971 (1972) (section-by-section analysis of Equal Employment Opportunities Enforcement Act of 1972), *with* S. REP. NO. 92-415, 92D CONG., 1ST SESS. 25 (1971), *reprinted in* LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 at 434 (1972).

processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820. Thus the legislative history of Title VII supports the straightforward meaning of §706 found by the court below.[24]

C. Policy Considerations Do Not Justify Deviating From The Plain Meaning Of The Statute.

Although the petitioner and the EEOC correctly note that "the 1964 statute was enacted to implement the congressional policy against discriminatory employment practices, and that that basic policy must inform construction of this remedial legislation," *Mohasco*, 447 U.S. at 818, this principle is of no help to petitioner here. The explicit statutory requirements that "charges" be in writing and under oath, and filed and served on employers within a certain period of time—measured ~~in~~ days and not years—reflect a policy judgment by Congress that "the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820. Neither the EEOC nor the courts are free to override this fundamental Congressional policy choice.

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[24] Petitioner claims that reading the statute to require that charges be filed under oath within the limitations period would be imposing "a requirement more onerous than Congress believed was reasonable for states and localities to require in order to commence a [sic] proceedings under state or local laws." Petitioner's Brief at 12. However, when viewed in light of Congress' intention to "keep primary, exclusive jurisdiction in the hands of the State commissions and to avoid federal intervention unless its need was demonstrated," see 110 CONG. REC. 8193, 13087 (1964) (remarks of Sen. Dirksen); *Mohasco*, 447 U.S. at 821, it does not seem unreasonable that Congress would require that resort to the federal remedy would entail different or even more stringent requirements than the state or local remedies.

Petitioner's argument that literal or technical readings of Title VII are "'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process,'" *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), *quoting Love v. Pullman*, 404 U.S. 522, 527 (1972), is similarly unavailing. The statutory oath and filing requirements are hardly complex or technical concepts beyond the ken of ordinary laymen unassisted by counsel. The requirement of filing a document under oath within a certain time limit is as commonplace and familiar to laymen as the requirement of filing a tax return or request for an extension by April 15 of each year. Thus the policy of liberal construction of an arcane or technical provision of Title VII out of deference to a hypothetical "layman, unassisted by trained lawyers" is simply inapplicable here.

In rejecting the *pro se* petitioner's (and EEOC's) argument that Title VII's procedural requirements should be interpreted liberally, "in the interest of justice," in *Mohasco* this Court noted that

> in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law.

Mohasco, 447 U.S. at 826.

The petitioner and the EEOC make several policy arguments for a liberal interpretation of the statute under the rubric of step two of *Chevron* analysis that are designed to convince the Court that disastrous results would occur if the statute is given effect as written. First, the petitioner argues that if unsworn complaints and intake questionnaires are not

deemed to be "charges," then the EEOC might begin to post them on its website. Petitioner's Brief at 10-11. This argument does not present *amicus* EEOC in a very favorable light. In any event, there is overwhelming authority that intake questionnaires do not ordinarily constitute charges, see, *e.g.*, *Pijnenberg v. West Georgia Health System, Inc.*, 255 F.3d 1304 (11th Cir. 2001), and yet the EEOC does not post questionnaires on its website, so this member of the "parade of horribles" has little force.

The petitioner also argues that if unsworn complaints are not deemed to be "charges," then "in some cases" individuals who send unsworn letters to the EEOC would fall outside the protection against retaliation by employers for protected activity set out in §704 of the Act, 42 U.S.C. §2000e-3(a). Petitioner's Brief at 11. Although the word "charge" is indeed used in that portion of the statute, the statute also prohibits discrimination against an individual because he has "participated in any manner in an investigation, proceeding, or hearing under this subchapter," and against any individual because he has "opposed any practice made an unlawful employment practice by this subchapter." Together, these provisions have been held sufficiently broad to include employees who believe that they have been discriminated against but have never gone to the EEOC at all, much less filed a charge with that agency. See, *e.g.*, *Laughlin v. Metropolitan Washington Airports Authority*, 149 F.3d 253, 259 (4th Cir. 1998) (protected activity under Title VII includes participation in informal grievance procedures); *Knox v. State of Indiana*, 93 F.3d 1327, 1333, 1335 (7th Cir. 1996) (employee's internal complaint about sexual harassment by her supervisor constituted protected activity); *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, 957 F.2d 59, 64-65 (2nd Cir. 1992) (internal complaint constituted protected activity); *Novotny v. Great American Federal Savings & Loan Assoc.*, 584 F.2d

1235, 1259-1260 (3rd Cir. 1978) (protected activity does not have to take place in context of formal EEOC charge); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978) (protected activity included employee's letter to HUD complaining of discrimination against him and others); *Smith v. Golf Enterprises*, 1997 WL 279814 (N.D.Tex. 1997) (employee's telephone call to EEOC constituted protected activity under this section); *Troy v. Bay State Computer Group, Inc.*, 1994 WL 562591 (D.Mass. 1994) (same); *Croushorn v. Board of Trustees of University of Tennessee*, 518 F.Supp. 9, 21-23 (M.D.Tenn. 1980) (employee's announcement of intent to file an EEOC charge constituted protected activity).

Finally, the EEOC suggests that if EEOC "charges" are required to be under oath, the EEOC could no longer refer unsworn complaints to state and local agencies for investigation. EEOC Brief at 25. However, as the petitioner acknowledges, §706(c) of the Act authorizes the EEOC to forward unsworn complaints to the state or local agency, so invalidating the portion of the regulation in conflict with the statute would not prevent the EEOC from continuing this practice. Petitioner's Brief at 11-12.

Because the regulation is in conflict with the plain meaning of the statute to the extent that it allows verification of a charge after the limitations period, the regulation is invalid with or without resort to any "deference" theory and the court of appeals should be affirmed.

II. THE EEOC REGULATION RELIED ON BY PETITIONER IS ENTITLED TO NO DEFERENCE.

Finding no support for his position in the language of the statute or in its legislative history, petitioner seeks to prevail by arguing that the courts are required to give

deference to a portion of an EEOC regulation which allegedly operates to excuse his late filing. He claims that this Court's ruling in *Chevron* mandates this result. Petitioner is wrong, as this Court need not go beyond the first step of *Chevron* analysis, if it applies *Chevron* at all.

A. *Chevron* Deference Is Inappropriate.

The *Chevron* deference doctrine rests on the principle that when Congress has explicitly or implicitly delegated to an agency authority to elucidate a specific provision or fill a gap in a statute, courts must defer to reasonable agency interpretations of the statute made pursuant to that delegated authority. *U.S. v. Mead Corp.*, 121 S.Ct. at 2171-72. *Chevron* deference is not appropriate where there is doubt that Congress intended to delegate particular interpretive authority to an agency, *Christensen v. Harris County*, 529 U.S. 576, 596-597 (2000) (Breyer and Ginsberg, JJ., dissenting), where the agency interpretation is contrary to the plain language of the statute, *U.S. v. Mead Corp.*, 121 S. Ct. at 2171; *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 126-127 (Stevens, Rehnquist, and Scalia, JJ., dissenting), or where the agency interpretation of the statute is not reasonable in light of the principles of statutory construction courts normally employ. *EEOC v. Arabian American Oil Company*, 499 U.S. 244, 260 (1991) (Scalia, J., concurring). Applying these principles, *Chevron* deference to the EEOC regulation is not appropriate here.

1. Any *Chevron* Inquiry Should End At Step One.

This Court has repeatedly emphasized that the EEOC was not given plenary regulatory or rulemaking power by the Civil Rights Act of 1964 or its 1972 amendments. *EEOC v. Arabian American Oil Company*,

499 U.S. 244, 257-258 (1991); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976). Although Congress did give the agency authority "to issue…suitable procedural regulations to carry out the provisions of this subchapter" in §713(a) of the Act, 42 U.S.C. §2000e-12(e), this does not operate as a delegation of authority to the agency to make rules, procedural or otherwise, that alter or effectively eliminate requirements mandated by the plain meaning of the statute. The specific delegation of authority to the EEOC in relation to "charges" is simply that charges "shall contain such information and be in such form as the Commission requires." §706(b) of the Act, 42 U.S.C. §2000e-5(b). As noted by the majority in the circuit court, even though the Act therefore gives the agency the power to delineate the form and informational content of charges, Congress noticeably did not give the agency the power to "tamper with" the statutory requirements that charges be in writing, under oath, and filed within the limitations period. JA 37. There are no ambiguities or gaps in these aspects of the statutory scheme that Congress has expressly or impliedly empowered the EEOC to "elucidate or fill." *U.S. v. Mead Corp.*, 121 S.Ct. at 2171. The only "ambiguity" in the statute is created by the EEOC regulation itself, which throws into doubt the filing deadline for charges and the time in which a respondent must be notified of a charge. *Chevron* deference is therefore inappropriate at step one.

This is especially so since the regulation in question is contrary to the plain meaning of the statute. While it is unclear exactly what statutory term is being elucidated, interpreted or defined by the EEOC in the regulation,[25] what

[25] The regulation provides that a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained

is clear is that its effect is to allow unsworn complaints to be treated as "charges" and to allow the filing of charges "in writing under oath or affirmation" after the statutory limitations period. Thus the effect of the regulation is to define "charge" to mean one thing in §706(b) of the Act and another in §706(e). As was demonstrated above, a uniform reading of the term "charge" throughout §706 gives effect to the plain language of the statute without leading to "absurd or futile results." *Mohasco*, 447 U.S. at 818. Furthermore, such a reading accords with a "coherent and consistent" statutory scheme. See *Robinson*, 519 U.S. at 341. Therefore, the plain language, the specific context, and the broader context of the statute as a whole weigh in favor of giving "charge" one meaning throughout §706. The plain language of the statute accordingly requires that any *Chevron* inquiry end at step one.

2. The Regulation Is Unreasonable At *Chevron* Step Two.

Should this Court determine that there is a statutory ambiguity in §706 that the EEOC has been empowered by Congress to fill, the Court must then move to *Chevron* step two. This entails a determination whether the agency's interpretation of the statute is a reasonable one, consistent with the "general congressional purpose." *U.S. v. Haggar Apparel Co.*, 526 U.S. 380, 393 (1999). As demonstrated above, the agency regulation is manifestly inconsistent with the "general congressional purpose" expressed in §706 of the Act, and is therefore unreasonable.

of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge…. Such amendments…will relate back to the date the charge was first received.

Petitioner and the EEOC rest a major part of their *Chevron* step two argument in support of the "reasonableness" of the EEOC regulation on analogies to NLRB regulations and Federal Rule of Civil Procedure 15. Should this Court find it appropriate to reach *Chevron* step two, these analogies should be rejected.

As the petitioner concedes, the National Labor Relations Act ("NLRA"), §29 U.S.C. §160(b), "does not itself require" that a charge be made under oath. Petitioner's Brief at 14. Rather, the regulations promulgated by the National Labor Relations Board imposed the oath requirement. Therefore, the court in *Union Starch & Refining Co. v. National Labor Rel. Bd.*, 186 F.2d 1008 (7th Cir. 1951), relied on by the petitioner, did not decide a case in which an agency had by regulation relaxed the requirements of a statute. In fact, none of the cases cited by the petitioner address relaxation of requirements imposed by Congress, only those imposed by the agency itself.

Accepting petitioner's position that Congress initially modeled Title VII after the NLRA, the differences in the language of the two Acts should be interpreted to have some meaning. Perhaps Congress was aware of the NLRA's lack of an oath requirement and concluded that such a requirement should be included in Title VII. In any event, courts must "give effect to the statute as enacted"—that is, that "charges" must be both in writing and under oath. See *Mohasco*, 447 U.S. at 818-19. As pointed out above, the EEOC has no power to alter that requirement, or the filing deadline for charges, regardless of what powers the NLRB may have under different legislation.

The petitioner's analogy to practice under FRCP 15 and similar state rules also fails. The issue here is whether Congress vested the EEOC with the power to alter a

substantive requirement included by Congress in the statute creating the right to file a discrimination charge. As demonstrated above, granting the EEOC such power would allow the agency to alter the balance struck in the statute between protecting employees' rights and assuring fairness to employers by diluting the limitations period for asserting the statutory right. Congress vested the EEOC with no such authority. The authority this Court and others may have to allow amendments to various pleadings asserting substantive claims with no statutorily-required oath requirement is simply irrelevant. *Becker v. Montgomery*, 121 S.Ct. 1801 (2001), relied on by the petitioner and the EEOC, dealt with harmonizing two court-made rules of procedure, not a conflict between a statutory requirement and a court-made rule of procedure.

Moreover, in the circumstances where this and other courts have allowed amendments to pleadings to relate back to an earlier filing, such as in *Becker*, the party affected by the pleadings at least had timely notice that the defective pleading had been filed. As demonstrated by this case, under petitioner's interpretation of the EEOC regulations, the respondent gets no notice of the charge at all until the untimely curative amendment is made. This effectively eliminates the statutory requirement of notice to respondents within ten days of filing, thus frustrating the Congressional purpose in creating the prompt notice requirement in the first place.

The EEOC argues in its *amicus* brief that there would be no violence to the statutory scheme in allowing the EEOC to alter the timing of the oath requirement as it has done in its regulation, since employers are not notified of or required to actually respond to charges until they have been put under oath. EEOC Brief at 22. This argument proves too much by half: it underscores the inconsistency of the agency

regulation at issue with the explicit Congressional requirement that respondents be "served" with a copy of a "charge" within ten days of filing. It ignores the violence done by the regulation to the careful balance struck by Congress in lengthening the statute of limitations, but requiring charges to be made under oath and sent to employers within ten days of filing.[26] It also reveals the internal inconsistency of the agency's definitions of "charge" and "filing." A "charge" is deemed by the EEOC to be filed within the limitations period so long as it is in writing, whether or not it is under oath, but it is not deemed to be "filed" for purposes of the statutorily-required notice to the employer until it has been placed under oath. This is exactly the sort of linguistic charade by the EEOC disapproved of by this Court in *Mohasco*.

The regulation is also an unreasonable interpretation of the Act because it undercuts the strong preference expressed by Congress in Title VII that employment discrimination disputes be resolved by conciliation in the EEOC rather than litigation. See *W.R. Grace & Co v. Local Union 759, International Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 770-771 (1983). A charge of discrimination under the Act is

[26] Under the system urged as fair by the EEOC, there would be no deadline for verifying a charge, with resulting lengthy delays in notification to the employer. But this Court, as did Congress in 1972, has recognized the unfairness of requiring employers to defend against stale claims. *Mohasco*, 447 U.S. at 820. The employer's investigation and attempted resolution of the claim become more difficult with the passage of time. Memories fade and employees move on. Also, "backpay obligations and the difficulty of reintegrating a terminated worker into the workforce grow with each day that passes before an employment dispute is resolved." *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 80 (7th Cir. 1992). "The short statutes of limitations in employment cases have a purpose…and it is ill served when the employer does not receive prompt notice of the dispute." *Early*, 959 F.2d at 80-81, *citing Delaware State College v. Ricks*, 449 U.S. 250, 256-257 (1980).

not meant merely to toll the limitations period so that a complainant may prepare for litigation. Rather, the charge is meant to provide a basis for an EEOC investigation and for attempts at conciliation. As demonstrated by this case, the application of the regulation as argued for by petitioner and the EEOC would allow a complainant to toll the limitations period without notifying the employer of the alleged discrimination until after the time for conciliation or reinstatement had passed. Thus, instead of providing a vehicle for conciliation, the filing of a charge with the EEOC becomes nothing more than a prerequisite for litigation. This is contrary to the "general congressional purpose" expressed in the Act.

Thus the EEOC regulation at issue is not only unauthorized by and inconsistent with the plain meaning of the enabling statute, it is not a reasonable or permissible interpretation of the statute and is not entitled to deference at either step one or step two of *Chevron*.

B. Deference Is Inappropriate Under *Skidmore*.

The EEOC regulation fares no better using the deference analysis set out in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which this Court has identified as the appropriate analytical framework to use when considering the weight to be given to EEOC regulations under Title VII. See *EEOC v. Arabian American Oil Co.*, 499 U.S. at 257, *citing General Electric Co. v. Gilbert*, 429 U.S. 125, 140-141 (1976).

The *Skidmore* deference doctrine was articulated by Justice Jackson in *Skidmore v. Swift & Co.*, 323 U.S. at 140, as follows:

> The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The EEOC regulation in question here was initially promulgated in 1966, without using notice and comment rulemaking.[27] The EEOC re-issued it essentially unchanged in 1977 using notice-and-comment procedures.[28] There is no record of any particular care or thoroughness in the agency consideration of the regulation, and the fact it was promulgated without notice and comment weakens its claim to deference under *Mead*, 121 S.Ct. at 2173. While the regulation is certainly longstanding, it is difficult to see how a 1966 regulation could constitute a "reasoned analysis" of the amendments to §706 of the Act passed in 1972. The regulation made sense as part of the EEOC's internal procedures in processing charges of discrimination under the original Civil Rights Act of 1964, when the phrase "in writing under oath" could be read as merely prefatory language rather than a clear statutory requirement.[29] *Choate v. Caterpillar Tractor Company*, 402 F.2d 357, 359 (7th Cir. 1968) (requirement in 1964 version of Act was "directory

[27] Equal Employment Opportunity Commission Procedural Regulations, 31 Fed. Reg. 10269 (1966).

[28] Equal Employment Opportunity Commission Procedural Regulations, 42 Fed. Reg. 55,388 (1977).

[29] See discussion in note 20, *supra*.

and technical rather than mandatory and substantive"). The regulation became substantively inconsistent with the statute, however, when the 1972 amendments to the Act required that all charges be "in writing under oath or affirmation."

Under *Skidmore*, more deference is due to an agency regulation based on an agency's specialized experience, particularly when the subject of the regulation is highly technical. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 115. But as pointed out above, the requirement of filing a charge under oath within a certain time period is hardly an esoteric concept, resting on unique knowledge within the specialized experience of the EEOC.

Agency practice in applying its regulation is also important in deciding the degree of deference owed to the agency regulation. *U.S. v. Mead Corp.*, 121 S.Ct. at 2175. The agency's actions in this case demonstrate that little deference is owed to the regulation. Despite the existence of the regulation, the EEOC did not treat Edelman's unsworn letter as being a charge at all, repeatedly reminded Edelman of that fact, never required Edelman to verify the letter he and the agency now seek to have deemed to be a charge "in writing under oath," and never provided the letter either to the College or the state deferral agency, as is required for "charges" by both the statute and agency regulations.

Finally, under *Skidmore*, the Court will consider other factors that give the agency interpretation the "power to persuade, if lacking power to control." *EEOC v. Arabian American Oil Co.*, 499 U.S. at 257, *quoting General Electric Co. v. Gilbert*, 429 U.S. at 141-142, *and Skidmore v. Swift & Co.*, 323 U.S. at 140. The major arguments in favor of deference made by Edelman and the *amicus* briefs fall into this category, albeit ostensibly under the rubric of step two of *Chevron*.

Petitioner and the EEOC argue that the regulation should be upheld and deferred to in order to accomplish the beneficial statutory purpose of allowing lay people without benefit of counsel to file their charges free of technical requirements imposed by the statute. The short answer to this argument is that accepting it would effectively eliminate any sensible meaning of the limitations period set out in the statute. Congress obviously believed a short limitations period to be important, expressing it in days rather than years. Upholding the power of the EEOC to declare the verification requirement to be a mere "technical" defect in a charge that can be corrected after the statutory limitations period would upset the legislative compromise that allowed passage of the Act in the first place, a compromise based on the assumption that "the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination." *Mohasco*, 447 U.S. at 820.

Moreover, if the EEOC has the power to relegate the statutory oath requirement for charges to mere "technical" status, there would be no principled basis for saying the EEOC could not do the same for the statutory requirement that charges be in writing, declaring that requirement, too, to be a mere "technical" defect that could also be cured long after expiration of the limitations period. The logic of petitioner's deference argument would permit the EEOC to change its regulation to allow post-limitations "curing" of telephonic "charges."

Upholding the regulation here would violate the fundamental principle that implementing regulations or administrative procedures cannot override their authorizing statute. As this Court noted in *Mohasco*,

> [w]e must…reject any suggestion that the EEOC may adopt regulations that are inconsistent with the statutory mandate. As we have held on prior occasions, its 'interpretation' of the statute cannot supersede the language chosen by Congress.

Mohasco, 447 U.S. at 825.

III. INVALIDATING §1601.12(B) WILL NOT UNDULY HAMPER THE ACCESS OF INDIVIDUALS TO THE REMEDIES PROVIDED IN TITLE VII.

To invalidate the portion of the EEOC regulation at issue here would by no means prevent the EEOC from permitting amendments to charges in order to assist claimants. All Title VII requires of claimants in the EEOC is that they file a written sworn charge of discrimination within the limitations period. Congress left to the EEOC the power to determine what else was required. So long as a charge is initially timely filed, in writing, and under oath, the EEOC can allow claimants to make technical amendments to the charge that relate back to the time of filing, as it has in the portion of 29 C.F.R. §1601.12 not at issue here. So, for example, where a charge does not allege the proper legal grounds for an action, the claimant can amend it under this regulation, just as a civil complaint may be amended if the plaintiff fails to state a cause of action upon which relief may be granted.

Equitable tolling remains available to the courts to ameliorate any situations where a strict adherence to the charge requirements and filing deadlines set out in the statute would lead to unduly harsh results. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. at 393.

As courts interpreting Title VII filing requirements have often found, see, *e.g.*, *Lawrence v. Cooper Communities, Inc.*, 132 F.3d 447 (8th Cir. 1998), there may be individual circumstances where the equitable tolling doctrine justifies giving effect to a charge or an intake questionnaire sworn to after the limitations period has expired. Judicial use on a case-by-case basis is the proper domain of equitable tolling: but the need for equitable tolling in some cases is not a good argument for expansion of agency rulemaking power beyond the limits set out in enabling legislation. Nor is this a reason to allow the EEOC to ossify the permissibility of belated verification in a regulation applicable to all cases, including one like Edelman's, where the principles of equitable tolling justify no relief whatsoever.[30]

CONCLUSION

The portion of 29 C.F.R. §1601.12(b) that allows relation back of charges verified after the statutory limitations period exceeds the EEOC's authority and is inconsistent with the statutory scheme. Equitable estoppel principles can be used to temper the harshness of the

[30] The district court ruled that Edelman was not entitled to equitable tolling because his situation "is not one where the delays of anyone beside himself hindered his ability to timely commence proceedings." JA 30. The court of appeals agreed, noting that Edelman was not entitled to equitable tolling of the limitations period for what "is at best a garden variety claim of excusable neglect" (citation omitted). JA 43. This Court denied Edelman's petition for *certiorari* on the equitable tolling question.

statutory limitations period on appropriate facts, which are not present here. The court of appeals ruling should therefore be affirmed.

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LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

I. 29 C.F.R. § 1601.12(b) IS VALID

(1) Respondent acknowledges that section 1601.12(b) was valid when the regulation was originally promulgated in 1966, but insists that Congress overturned the regulation when it adopted the 1972 amendments to Title VII. (R.Br. 36-37[1]; *see id.* at 20 n. 22). Respondent argues that the 1972 amendments converted the statute's requirement that a charge be verified into the *definition* of a charge, so that only a verified charge is, as a legal matter, a "charge" under Title VII. (R.Br. 16-17, 31).

Even as amended in 1972, however, the terms of section 706(b) remain directory rather than definitional. Section 706(b) now provides that a charge "shall be" under oath or affirmation, not that a charge "is" or "is defined as" a document under oath or affirmation. In this regard the language of section 706(b) is essentially the same as the language of the Rule at issue in *Becker v. Montgomery*, 532 U.S. 757, 121 S.Ct. 1801 (2001), which required that every notice of appeal "shall be signed." Fed.R.Civ.P. 11. This Court in *Becker* characterized that language as establishing a "signature requirement'," not as defining what constitutes a notice of appeal. 121 S.Ct. at 1805.

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[1] "The regulation made sense as part of the EEOC's internal procedures in processing charges of discrimination under the original Civil Rights Act of 1964. . . . The regulation became substantively inconsistent with the statute, however, when the 1972 amendments to the Act required that all charges be 'in writing under oath or affirmation.' "

Where Congress established the definition of a term in Title VII, it did so expressly and unambiguously. Section 701, entitled "Definitions," defines the meaning of ten specific terms or phrases, generally using the verb "means." The 1972 legislation amended five definitions (those of "person," "employer," "employee," "industry affecting commerce," and "labor organization in an industry in commerce"), and added a new definition (of "religion"). In this context, the decision to reject such definitional language with regard to the oath or affirmation requirement in section 706(b) was clearly deliberate.[2]

Moreover, the 1972 legislation does not reflect any congressional decision to invalidate the then six-year-old EEOC regulation. The original oath requirement was contained in section 706(a) of the 1964 Act, which required the EEOC to notify the employer and conduct an investigation

> [w]henever it is charged under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe that a violation of this title has occurred . . . that an employer . . . has engaged in an unlawful employment practice.

78 Stat. 259. The 1972 legislation renumbered this provision as section 706(b), and reworded the relevant portions as follows:

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[2] As we noted in our opening brief, the Senate in fact rejected a proposal by Senator Allen to *define* a charge as an allegation under oath or affirmation. (Pet. Br. 12 n. 9; see R.Br. 21).

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be made in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

42 U.S.C. § 2000e-5(b).

This revision made four specific substantive changes with respect to a charge. First, the amendment permits charges to be filed under affirmation as well as under oath. Second, unlike the 1964 law, a Commissioner's charge too must be under oath (or affirmation). Third, the 1972 amendment permits a third party to file a charge on behalf of a victim of discrimination; that new form of charge also must be under oath or affirmation. Fourth, any charge must also contain such information and be in such form as the Commission may require.

The 1972 amendment moved the oath (or affirmation) requirement into a new, freestanding sentence. That change was necessary for purely syntactical reasons. The rule regarding charges grew from two words ("under oath") in the 1964 Act to approximately twenty words under the 1972 amendments, and under those amendments the lengthier requirement applied to three different types of charging parties. It would obviously have been unwieldy to repeat a twenty-word requirement after each type of charging party. Rather, the framers simply placed

the expanded requirements in a single freestanding sentence applicable to all charging parties.

The legislative history of the 1972 amendments contains no indication that Congress intended to alter the meaning of the oath requirement or to invalidate the then existing regulation. Section 706(b), like many other provisions of the 1972 law, was worked out by amendment on the floor of the Senate; when that process was completed, Senator Williams, the chief sponsor of the bill, placed in the Congressional Record an authoritative and undisputed section-by-section analysis. Far from mentioning any change in the oath requirement, that analysis stated, "The present requirement that charges must be in writing and under oath or affirmation has been retained."[3]

Respondent suggests that Congress imposed a more stringent oath requirement as a part of a compromise to obtain agreement on the amendment lengthening the charge filing period. (R.Br. 24). The section-by-section analysis, however, states to the contrary that

> [i]n establishing the new time period for the filing of charges, it is not intended that existing law, which has shown an inclination to interpret this type of time limitation to give the aggrieved person the maximum benefit of the law, should be in any way circumscribed.[4]

There is nothing in the legislative history indicating any compromise was afoot; the change in the length of the charge filing period was not in dispute, and it was not

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[3] 118 Cong. Rec. 4941 (1972).

[4] 118 Cong. Rec. 4941 (1972).

mentioned by Senator Allen when he asked Senator Williams to include the oath or affirmation language. To the contrary, even respondent describes Senator Allen as having intended merely to "preserve" the law as it existed under the 1964 Act. (R.Br. 21).[5]

(2) Respondent apparently contends that section 1601.12(b) is inconsistent with the requirement of section 706(b) that an employer be notified[6] by the EEOC within ten days after the filing of a charge. (R.Br. 14, 15, 19, 30).[7]

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[5] Respondent's reliance on the views of Senators Allen and Ervin regarding the meaning of the 1972 legislation seems particularly unwarranted. Both senators were longstanding, adamant opponents of civil rights legislation, and both voted against passage of the 1972 Act. 118 Cong. Rec. 4944, 7170 (1972).

[6] Respondent repeatedly asserts that Title VII requires that a copy of the charge be served on the employer. (R.Br. 13, 15, 24, 25, 34, 37). That requirement is not contained in the statute itself, which requires only that the employer be *notified* within ten days that a charge has been filed. 42 U.S.C. § 2000e-5(b) ("the commission shall serve a notice of the charge (including the date, place and circumstances of the alleged employment practice) on such employer"). EEOC regulations do require service of the charge in many circumstances. 29 C.F.R. § 1601.14.

[7] Respondent may be contending that the EEOC acted improperly in failing to provide such notice in November, 1997. Such a contention, however, is not relevant to the validity of section 1601.12(b).

It would not be incongruous for the Commission to deem the filing of an unsworn charge to be sufficient to satisfy the charge-filing deadline, but nonetheless to postpone notice under section 706(b) until a sworn (or otherwise corrected) charge was received. That is precisely the practice of this Court with regard to a timely but technically defective certiorari petition. The petition is "deemed timely" even if the corrected

But section 1601.12(b) does not address in any way *when* an employer should be notified of the filing of a charge, and assuredly does not require Commission employees to postpone notifying an employer about an unsworn charge until the charging party has submitted that charge under oath or affirmation. Nothing in section 1601.12(b) would have precluded the EEOC from notifying respondent in November 1997 that it had received petitioner's letter alleging unlawful discrimination. If the Commission acted improperly in failing to do so, such an error would affect neither the validity of section 1601.12(b) nor the sufficiency of the letter or of any other charge.[8]

Respondent objects that it would be possible under section 1601.12(b) for a charging party to wait years after the end of the 300-day charge-filing period before finally providing the required oath or affirmation. (R.Br. 38). Under section 706(b), respondent argues, an employer is entitled to notice of a charge by the 310th day[9] after the

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petition, although promptly substituted, is submitted more than ninety days after the judgment of which the petitioner seeks review. Supreme Court Rule 14.5. In such a case the thirty-day period within which a respondent must submit any brief in opposition only runs from the date on which the case was placed on the docket. Supreme Court Rule 15.3.

[8] The section-by-section analysis placed in the Congressional Record by Senator Williams stated, "It is not intended that failure to give notice of the charge to the respondent within ten days should prejudice the rights of the aggrieved party." 118 Cong. Rec. 4941 (1972). See *Waiters v. Robert Bosch Corp.*, 683 F. 2d 89, 93 (4th Cir. 1982).

[9] That period is arrived at by adding the 300 day charge filing period to the 10 days allotted to the EEOC to notify an employer after the filing of a charge.

alleged discrimination; unreasonable delays, it fears, will postpone notice until memories have long faded. (R.Br. 34 n. 26). But if a charging party willfully refused to provide the needed oath or affirmation, the Commission would undoubtedly dismiss the charge for lack of cooperation. EEOC Compliance Manual, section 4.4(b) (2001). In the instant case, moreover, there clearly was no prejudicial delay. Petitioner signed the Form 5 twenty days after it was mailed to him, the sworn charge was filed 313 days after the original act of discrimination, and EEOC sent respondent a copy of that charge on day 319. (JA 64-66).

Finally, respondent argues that section 1601.12(b) is unnecessary because the practical problems which it addresses could be solved on a case-by-case basis since "[e]quitable tolling remains available to the courts." (R.Br. 39-41). The vast majority of Title VII charges, however, do not result in litigation. Possible subsequent "*[j]udicial* use . . . of equitable tolling" (R.Br. 40) (emphasis added) would provide no basis on which the EEOC itself could determine whether a charge, timely submitted but only later sworn, was a timely charge within the Commission's jurisdiction. It would make no sense for the Commission to dismiss such charges and compel the charging party to seek a judicial determination of the applicability of equitable tolling. Such a course of action would needlessly burden the courts, and would preclude the Commission from engaging in the investigative and conciliatory function for which it was originally created.

II. THE CONTENTS OF PETITIONER'S NOVEMBER 14, 1997 LETTER WERE SUFFICIENT TO CONSTITUTE A CHARGE

Respondent suggests that petitioner's November 14 letter, regardless of whether or when it was sworn to, was somehow insufficient to constitute a charge. (R.Br. 6-10). Respondent appears to be suggesting that this argument would provide an alternative basis for affirming the decision below.[10] This issue was not resolved by a majority of the Fourth Circuit, and would more appropriately be addressed by the court of appeals on remand.

Respondent does not question the substantive content of the November 14 letter itself. The five page single-spaced letter is far more detailed than the verified form charge that was ultimately filed. *Compare* JA 48-52 *with* JA 63. The applicable EEOC regulations, whose validity respondent does not here question, require only that a charge be "sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b).[11] That standard was obviously

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[10] The district court dismissed the complaint on this basis. (Pet. App. 22a). Contrary to respondent's suggestion (R.Br. 11 n. 12), in the court of appeals petitioner expressly argued that this aspect of the district court decision was in error. Brief for Appellant, No. 99-2408 (4th Cir.), pp. 22-24.

[11] Respondent mistakenly asserts that there is "overwhelming authority" that EEOC intake questionnaires do not constitute charges. (R. Br. 27). To the contrary, the lower courts have repeatedly held that signed intake questionnaires which contain the requisite information will, at least ordinarily, constitute charges. *Wilkerson v. Grinnell Corp.*, 2001 WL 1262325 *4-*5 (11th Cir. 2001) (explaining and distinguishing *Pijnenburg*

satisfied. The letter concluded, "I hereby file a charge of employment discrimination against Lynchburg College . . . and I call upon the EEOC to investigate this case." (JA 52-53). That was undeniably "a clear . . . request for EEOC to act." EEOC Compliance Manual, § 2.2 (2001).[12]

Respondent objects that after filing the letter petitioner did not "procee[d] as if [he] regarded that letter to be a 'charge.' " (R.Br. 9). The meaning of this assertion is unclear. If the letter itself constituted a Title VII charge

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v. West Georgia Health System, 255 F. 3d 1304 (11th Cir. 2001)); *Veronda v. California Dept. of Forestry, etc.*, 2001 WL 283122 *2 (9th Cir. 2001) (intake questionnaire filed with state agency sufficient); *Fredrickson v. United Parcel Service*, 2000 WL 1599330 (9th Cir.); *O'Loghlin v. County of Orange*, 229 F. 3d 871, 873 (9th Cir. 2000); *Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F. 3d 1172, 1175 (9th Cir. 1999); *Woo-Ming v. California Dept. of Corrections*, 1999 WL 14295 *1 (9th Cir.); *Allen-Bell v. Topolinski*, 1997 WL 558019 *1 (9th Cir.); *Vargas v. Yellow Freight System, Inc.*, 1997 WL 413581 *2 (9th Cir.); *Simmons v. United Airlines*, 1997 WL 206026 *1 (9th Cir.); *Downes v. Volkswagen of America, Inc.*, 41 F. 3d 1132, 1137-38 (7th Cir. 1993); *Early v. Bankers Life and Casualty Co.*, 959 F. 2d 75 (7th Cir. 1992); *Philbin v. General Electric Capital Auto Lease, Inc.*, 929 F. 2d 321, 324 (7th Cir. 1991); *Clark v. Coats & Clark, Inc.*, 865 F. 2d 1237, 1239-41 (7th Cir. 1989); *Steffen v. Meridian Life Insurance Co.*, 859 F. 2d 534, 542-43 (7th Cir. 1988); *Gilardi v. Schroeder*, 833 F. 2d 1226, 1230-31 (7th Cir. 1987); *Casavantes v. California State University*, 732 F. 2d 1441 (9th Cir. 1984).

[12] See *Downes v. Volkswagen of America, Inc.*, 41 F. 3d 1132, 1138 (7th Cir. 1993); (*Bihler v. The Singer Co.*, 710 F. 2d 96, 99 (3d Cir. 1983) ("notice to the EEOC must be of a kind that would convince a reasonable person that the grievant has manifested an intent to activate the Act's machinery.")

when it was initially filed on November 14, 1997, petitioner's subsequent conduct could not have altered the nature or sufficiency of that earlier document.[13] In a separate letter petitioner's counsel advised the EEOC that he understood that the filing of the letter constituted the filing of a charge under section 706(b). (JA 54). Nothing thereafter done by petitioner or his counsel was inconsistent with that express understanding.

Finally, respondent argues that the EEOC did not proceed "as if they regarded that letter to be a 'charge.' " (R.Br. 9). But two Commission officials from the office in question submitted affidavits asserting that the letter was (or would in the normal course of business have been) sufficient to constitute and be treated as a charge. (JA 78-82). Several of the EEOC's actions reflected an understanding that the filing of the letter had constituted the filing of a charge. If the Commission had understood otherwise, it presumably would have responded to the

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[13] Petitioner's counsel asked the Commission to defer serving the charging documents on the employer until petitioner had been interviewed. (JA 54). This request confirms that petitioner's counsel regarded the letter as a charge. There would have been no reason to ask the Commission to delay *any* action unless petitioner and his attorney understood that the letter itself had constituted a charge, because the Commission would have had no occasion to act until and unless a charge had been filed. The letter itself did not constitute a request that the EEOC postpone complying with the requirement of section 706(b) that the Commission provide *notice* to the employer that a charge had been filed. The letter did not mention that notice, and it would have been entirely possible for Commission employees to interview petitioner by phone prior to the expiration of that ten day period. Both letters to the Commission contained the needed telephone numbers. (JA 53, 55).

letter from petitioner's counsel which expressly asked if further action was required of petitioner in order to meet the filing deadline. Had the Commission not regarded the filing deadline as having already been met, a belief which presumed that the letter was itself a charge, it would have acted with far greater dispatch when it prepared the Form 5, and would have warned petitioner of an impending deadline when it sent him the Form 5 on the 285th day after the alleged discriminatory act. In any event, if the November 14 letter was indeed a charge when it was filed, nothing done thereafter by Commission employees could have altered its status. "Title VII 'does not condition an individual's right to sue upon the EEOC's performance of its administrative duties.' " *Sims v. Trus Joist MacMillan*, 22 F. 3d 1059, 1063 (11th Cir. 1994) (*quoting Jefferson v. Peerless Pumps Hydrodynamic, Div. of FMC Corp.*, 456 F. 2d 1359, 1361 (9th Cir. 1972)).

CONCLUSION

For the above reasons, the decision of the Fourth Circuit should be reversed.

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LYNCHBURG COLLEGE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Title VII of the Civil Rights Act of 1964 provides that a charge of employment discrimination filed with the Equal Employment Opportunity Commission (Commission or EEOC) must be verified by the complainant under oath or affirmation, 42 U.S.C. 2000e-5(b), and must be filed within certain limitation periods, 42 U.S.C. 2000e-5(e)(1). An EEOC regulation, 29 C.F.R. 1601.12(b), provides that a discrimination charge that has been filed with the Commission within the statutory limitation period may be amended to cure "technical defects or omissions, including failure to verify the charge," and that an amendment to verify the charge "will relate back to the date the charge was first received" by EEOC, even if the verification of the charge is made after the statutory limitation period for filing a charge of discrimination. The question presented is whether 29 C.F.R. 1601.12(b) is valid.

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In the Supreme Court of the United States

No. 00-1072

LEONARD EDELMAN, PETITIONER

v.

LYNCHBURG COLLEGE

ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission (Commission or EEOC) has primary responsibility for administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12111 *et seq.* The Attorney General also has enforcement responsibilities under Title VII and the ADA with respect to public employment. Enforcement of both statutes depends on the timely filing of a charge of discrimination, and both statutes require that a charge of discrimination be in writing and under oath or affirmation. See 42 U.S.C. 2000e-5(b) (verification requirement under Title VII); 42 U.S.C. 2000e-5(e)

(time limits for filing charges under Title VII); 42 U.S.C. 12117 (ADA incorporates Title VII's procedural provisions).

In 1966, pursuant to its statutory authority to issue "suitable procedural regulations to carry out the provisions of [Title VII]," 42 U.S.C. 2000e-12(a), EEOC promulgated a regulation providing that "technical defects or omissions, including failure to verify," in an otherwise sufficient, timely-filed charge may be cured by amendment outside the statutory limitation period, and that "[s]uch amendments * * * will relate back to the date the charge was first received." 29 C.F.R. 1601.12(b). The court of appeals in this case invalidated that EEOC regulation and held, to the contrary, that a charge of discrimination must be dismissed unless it has been both filed and verified within the limitation period.

The Commission has an obvious interest in the validity of its regulation. In addition, under Title VII and Title I of the ADA, the Commission and the Attorney General cannot take enforcement action on a discrimination charge unless it has been timely filed, and so the court of appeals' decision directly affects their ability to enforce those statutes. The United States and EEOC filed an *amicus curiae* brief in this case at the petition stage in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. On June 6, 1997, respondent, a private college, denied tenure to petitioner, a biology professor, despite favorable recommendations from the chair of his department and a faculty committee. Pet. App. 2a. On November 14, 1997 (160 days later), petitioner sent a detailed letter to EEOC, alleging that respondent denied him tenure because of his sex, and that respondent's dean was systematically purging white men from the faculty. Pet. 2; Br. in Opp. 2. Petitioner

ended the letter by stating: "I hereby file a charge of employment discrimination against [respondent] * * * and I call upon the EEOC to investigate this case in an attempt to rectify this unjust and unfair situation before any more people are subjected to this illegal discrimination." C.A. App. 85-86. The letter was signed by petitioner, but was not executed under oath or affirmation. *Id.* at 86; Pet. App. 4a.

On November 26, 1997, petitioner's attorney wrote to EEOC, stating that petitioner "would like to have a personal interview with an EEOC investigator prior to the final charging documents being served on the college." Pet. App. 2a. That letter added that "[i]t is my understanding that delay occasioned by the interview will not compromise the filing date, which will remain as November 14, 1997. Please advise if my understanding in this regard is not correct." *Ibid.*

On December 3, 1997, an EEOC employee sent petitioner a form letter, without acknowledging his attorney's correspondence. The form letter stated that petitioner should telephone EEOC to arrange an interview. Petitioner's interview was eventually scheduled for March 3, 1998. After the interview, an EEOC employee drafted an EEOC Form 5 Charge of Discrimination and mailed it to petitioner on March 18, 1998, for petitioner's review and verified signature. The EEOC received the verified charge back from petitioner on April 15, 1998, 313 days after the last alleged discriminatory employment practice. On March 26, 1999, after completing its investigation, EEOC issued petitioner a notice of right to sue. Pet. App. 2a-3a.

2. Petitioner initially filed suit against respondent in Virginia state court and alleged various state-law claims. He later added a count alleging sex discrimination in violation of Title VII, 42 U.S.C. 2000e-2(a)(1). Respondent removed the action to federal district court and then moved to dismiss the Title VII claim on the ground that petitioner had failed to

file a valid charge of discrimination with EEOC within the applicable statutory limitation period. Pet. App. 3a. Respondent argued that a "charge" was not filed until EEOC received the verified Form 5 Charge on April 15, 1998, after the expiration of the applicable 300-day limitation period for filing a Title VII charge. See 42 U.S.C. 2000e-5(e)(1).[1] Petitioner contended that his initial letter of November 14, 1997, complaining of discrimination was a timely charge of discrimination and that, under an EEOC regulation, 29 C.F.R. 1601.12(b), his subsequent verification (on the Form 5 charge) related back to that date. Although respondent acknowledged that regulation, it argued, *inter alia*, that the regulation conflicted with the underlying statute. See Br. in Opp. 5 n.1.

Without questioning the validity of the EEOC regulation, the district court agreed with respondent that petitioner had

[1] The basic limitation period for filing a Title VII discrimination charge with EEOC is 180 days after the unlawful employment practice. 42 U.S.C. 2000e-5(e)(1). If the charging party has filed a discrimination charge with a qualified state or local agency, then the statutory limitation period for filing a charge with EEOC is 300 days. 42 U.S.C. 2000e-5(e)(1). (Such state and local agencies are commonly referred to as "deferral" agencies. See *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988); *Tinsley* v. *First Union Nat'l Bank*, 155 F.3d 435, 439-442 (4th Cir. 1998).) In addition, if a complainant submits a charge of discrimination to EEOC based on employment practices that occurred in a State or locality that has a "deferral" agency, the 300-day limitations period applies and the EEOC refers the discrimination charge to the appropriate state or local agency for processing, even if the complainant has not filed a discrimination complaint directly with that state or local agency. See 29 C.F.R. 1601.13(a)(3)-(4) and (c); *Tinsley*, 155 F.3d at 439. Virginia has such a deferral agency, the Virginia Council on Human Rights (VCHR). See 29 C.F.R. 1601.74(a); *Tinsley*, 155 F.3d at 440. A worksharing agreement between EEOC and VCHR provides that EEOC's receipt of charges on VCHR's behalf is deemed to "automatically initiate the proceedings of both EEOC and [VCHR]" for purposes of fulfilling Title VII's deferral requirements. C.A. App. 118.

failed to file a timely charge, dismissed petitioner's Title VII claim, and remanded the remainder of the case to state court. Pet. App. 16a-17a. Although the district court noted that petitioner initially wrote to the Commission to complain about employment discrimination by respondent on November 14, 1997, and that his attorney wrote to the Commission on November 26, 1997—both dates well within the 300-day limitation period—it concluded that "neither [petitioner] nor the EEOC proceeded as if the November 1997 letter[s] did, or were intended to, commence proceedings." *Id.* at 22a-23a.

3. The court of appeals affirmed, but the panel was divided in its reasoning. Pet. App. 1a-13a (majority); *id.* at 14a-15a (concurrence).

a. The majority did not take issue with petitioner's submission that, under the Commission's regulations, EEOC would have treated his initial, non-verified letter as a charge of discrimination. It concluded, however, that EEOC's regulation permitting the verification to relate back to the filing of the initial complaint is contrary to the statute and therefore invalid. Pet. App. 1a-2a.

The majority applied the framework for review of agency regulations established in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Pet. App. 5a. Identifying "[t]he precise question at issue in this case" as "whether verification must occur within the statutory limitations period," the court ruled that "Congress has unambiguously spoken" on that question. *Id.* at 6a. The court noted that Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), specifies that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The "plain meaning of this language," stated the court, "compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the

form required by the Commission, it is not a charge." Pet. App. 6a.

In addition, the court stated that Section 706(e)(1) of Title VII, 42 U.S.C. 2000e-5(e)(1), "affirmatively and plainly establishes the time period within which a charge must be filed." Pet. App. 6a. Thus, the court concluded, "[b]ecause a charge requires verification [and] because a charge must be filed within the limitations period, it follows that a charge must be verified within the limitations period." *Ibid.* (citations omitted). Because it found that the statutory language resolved the matter at hand, the court rejected petitioner's argument that EEOC's regulation is entitled to deference. *Ibid.*

b. Judge Luttig concurred only in the judgment. Pet. App. 14a-15a. He would have affirmed the dismissal of petitioner's claim on a narrower ground similar to that relied on by the district court—namely, that petitioner did not intend his initial letter to the Commission to be treated as a charge of discrimination. *Id.* at 14a.[2]

Judge Luttig stated that he was "sufficiently uncomfortable" with the broader ground relied on by the majority —that "verification may never relate back" after expiration of the limitation period—that he was unable to concur in that ruling. Pet. App. 14a. He noted that "we are not confronted with a single statute stating either by terms or in effect that 'a verified charge must be filed within [300] days of a discriminatory action.'" *Ibid.* Rather, he observed, "we are presented with two statutes, the first providing that a charge shall be filed within [300] days of the unlawful employment practice, and the second providing that charges

[2] If the case is remanded, as we suggest below, respondent would be free to pursue its alternative argument that petitioner did not intend his initial letter to the Commission to be a "charge." See p. 5, *supra*; but see pp. 2-3, *supra*.

shall be in writing and include an oath or affirmation." *Ibid.* He further noted that "there is not *necessarily* the nexus required" between those two statutes to sustain the majority's reading. *Ibid.* "[I]f the two statutes are so read as temporally independent of each other, or at least not temporally coterminous, then there is no statutory requirement that the charge be verified within the [300] days, and relation back would be available by regulation." *Ibid.*

Finally, Judge Luttig observed, "there is no statutory definition of 'charge'" in Title VII. Pet. App. 14a-15a. Therefore, he continued, "the 'charge' that must be filed within [300] days need not—at least need not by definition—be an allegation that is verified * * * . Insofar as the statute informs us, the 'charge' that must be filed within [300] days can be merely an allegation of discrimination; it need not be verified." *Id.* at 15a. Accordingly, because he did not find EEOC's regulation to be contrary to anything in the statute, he would have upheld that regulation. *Ibid.*

SUMMARY OF ARGUMENT

The EEOC regulation at issue in this case validly permits the Commission to take action on a verified charge of discrimination under Title VII as long as the charge is submitted to the Commission within the limitation period for filing charges, even if the verification occurs after that period has expired. Although Title VII requires allegations in a charge of discrimination to be made "under oath or affirmation," 42 U.S.C. 2000e-5(b), and also imposes time limits for the filing of charges with EEOC, see 42 U.S.C. 2000e-5(e)(1), it does not expressly require verification within the limitation period for filing charges, nor does it provide express time limits for verification. The two provisions address distinct aspects of the charge-filing process and do not incorporate each other by reference. Accord-

ingly, the court of appeals erred in concluding that the statute unambiguously requires verification to occur within the time limits for filing a charge.

The regulation reflects well-established background legal principles. Federal and state courts have consistently ruled that, even when a complaint must be verified, as long as the complaint is timely filed, it may be verified after the expiration of the limitation period for the complaint. Nothing in Title VII suggests that Congress intended to depart from that principle, which was firmly established by the time of the statute's enactment in 1964.

The Commission's regulation is reasonable and entitled to deference. The regulation is not only consistent with the common law rules governing verified complaints, it also reasonably accommodates the purposes of the charge, verification, and limitation provisions of Title VII. Because the Commission may not enforce Title VII against an employer without a verification, the regulation accommodates the employer's interest in avoiding frivolous complaints. Because the complaint must be filed with EEOC within the limitation period, it accommodates the employer's interest in avoiding stale charges. At the same time, the regulation recognizes that most individuals who complain to the Commission are laypersons who will not know of the verification requirement. The regulation thus ensures that EEOC can enforce Title VII and that individuals do not inadvertently lose their rights but also protects employers against meritless and stale claims.

ARGUMENT

THE EEOC'S REGULATION PROVIDING THAT AN OTHERWISE SUFFICIENT, TIMELY-FILED CHARGE OF DISCRIMINATION MAY BE VERIFIED AFTER THE CHARGE-FILING PERIOD IS VALID AND REASONABLE

A. The Text Of Title VII Does Not Require A Charge Of Discrimination To Be Verified Within The Limitation Period For Filing A Charge With EEOC

The issue in this case is whether an otherwise valid charge of discrimination must be verified by the complainant within the limitation period for filing a complaint. As always, the first question is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). The court of appeals concluded that Congress had expressly provided that a charge must be verified within the limitation period for filing charges with the Commission. That conclusion is erroneous.

Section 706(b) of Title VII provides that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. 2000e-5(b). The court of appeals read Section 706(b) to provide that only a charge made under oath or affirmation can be a valid "charge." According to the court of appeals, Section 706(b) effectively defines the word "charge" in Title VII to mean only a document executed under oath or affirmation. As the court of appeals put the matter, the "plain meaning" of Section 706(b) "compels the conclusion that if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge." Pet. App. 6a. Under the court of appeals' reading, therefore,

a written complaint of discrimination that was filed with EEOC within the time limits and that otherwise complies with EEOC regulations is not a "charge" if it was not verified within those time limits.

The statute, however, does not define the term "charge" to mean only a complaint made under oath or affirmation. Indeed, as Judge Luttig pointed out (Pet. App. 14a-15a), Title VII does not contain a definition of "charge" at all—even though, in a separate definitional section, 42 U.S.C. 2000e, it expressly defines several other terms—and a "charge" can mean simply "an allegation of discrimination." Although Section 706(b) provides that "[c]harges shall be in writing under oath or affirmation," that requirement is not framed as a definition; it does not state that the word charge "means" or "is" a document in writing under oath or affirmation. Rather, it directs that something that *is* a charge be sworn to or affirmed.

The panel majority inferred a close nexus between Section 706(b), which contains the verification requirement for charges, and Section 706(e), 42 U.S.C. 2000e-5(e), which sets forth the limitation periods for filing charges. Section 706(e) provides that, in deferral states such as Virginia (see note 1, *supra*), a charge "shall be filed [with EEOC] * * * within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. 2000e-5(e).

The two provisions, however, address separate requirements in the charge-filing process, and neither incorporates the other by reference. Section 706(b), which contains the verification requirement, does not refer to the time limits in Section 706(e), and Section 706(e) is silent as to whether the "charge" that must be filed within 300 days of the alleged discriminatory act must also be verified *at the time of filing*. While there is a statute of limitations for filing a charge, there is simply no statute of limitations for verification. As Judge Luttig observed (Pet. App. 14a), the statute does not

state either in express terms or in effect that "a verified charge must be filed within [300] days of a discriminatory action."

This court rejected a similar effort to superimpose Section 706(e)'s time limits on a separate provision of Title VII in *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393-394 (1982). In *Zipes*, this Court refused to read Section 706(c)'s timely-filing requirement as a jurisdictional prerequisite for purpose of Title VII's jurisdictional provision, Section 706(f). As the Court explained, the latter provision, "contains no reference to the timely-filing requirement. The provision specifying the time for filing charges with the EEOC appears as an entirely separate provision, and it does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Ibid.*

The court of appeals' approach to Sections 706(b) and (e) likewise resembles the method of statutory interpretation that this Court rejected last Term in *Becker* v. *Montgomery*, 121 S. Ct. 1801 (2001). In *Becker*, the Sixth Circuit concluded that a timely notice of appeal was ineffective because it was not signed by the party or his attorney, as required by Federal Rule of Civil Procedure 11(a), within the jurisdictional time period for filing a notice of appeal. The court of appeals held that the omission of the signature could not be corrected after that time period had expired. *Id.* at 1804-1805. This Court rejected the argument that, because Civil Rule 11(a) requires all papers filed in district court (including notices of appeal) to be signed, an unsigned notice of appeal was ineffective to meet the jurisdictional requirements governing notices of appeal in Federal Rules of Appellate Procedure 3 and 4. This Court declined to "dislodge the signature requirement from its Civil Rule 11(a) moorings and make of it an Appellate Rule 3 jurisdictional specification." *Id.* at 1807. Rather, the Court concluded that, although both Civil Rule 11(a) and the Appellate Rules set forth mandatory

requirements for notices of appeal, those Rules do not, either singly or in combination, provide "that the signature requirement cannot be met after the appeal period expires." *Id.* at 1805. To the contrary, the Court held, "if the notice [of appeal] is timely filed and adequate in other respects, jurisdiction will vest in the court of appeals, where the case may proceed so long as the appellant promptly supplies the signature once the omission is called to his attention." *Id.* at 1804.

Just as the Civil Rules do not provide a time limit for signatures, Title VII does not specify a time limit for verification. The EEOC's regulation fills that gap. That regulation first sets forth requirements for a charge of discrimination, including that the charge contain information identifying the complainant and the respondent, a statement of the pertinent facts, and other information. See 29 C.F.R. 1601.12(a). The regulation then specifies the minimum information that a charge must contain to vest jurisdiction in the Commission—namely, that a charge will be sufficient "when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. 1601.12(b). The regulation further provides that "[a] charge may be amended to cure technical defects or omissions, including failure to verify the charge," and that "[s]uch amendments * * * will relate back to the date the charge was first received." *Ibid.* Thus, as with the Rules this Court examined in *Becker*, the EEOC regulation sets forth minimum requirements for a "charge" sufficient to vest the Commission with authority over the case, and then provides that other requirements for a charge may be supplied after the limitation period has expired.

B. Background Legal Principles Make Clear That A Timely-Filed Complaint Ordinarily May Be Verified After The Limitation Period For The Complaint Has Expired

The court of appeals' conclusion that a charge of discrimination must be verified within the limitation period for filing charges is not only unsupported by the text of Title VII and contrary to EEOC's gap-filling regulation, but it is also contrary to well-settled background legal principles articulated in dozens of state and federal decisions both before and after Congress enacted Title VII. Those decisions establish that, even when a complaint or other court filing must be verified, verification may occur after the limitation period for the complaint has expired, as long as the unverified complaint was filed in time. Congress, a "lawyers' body" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), is presumed to have been aware of that well-settled law when it enacted Title VII. Cf. *Morissette* v. *United States*, 342 U.S. 246, 262-263 (1952). Accordingly, Title VII is most naturally read to incorporate this judicial rule into the administrative context of EEOC proceedings. At a minimum, EEOC's regulation, incorporating the common law rule, is entitled to deference. See pp. 18-26, *infra*.

In modern practice under the Federal Rules of Civil Procedure and most corresponding state rules, pleadings generally need not be verified or accompanied by an affidavit, except when "specifically provided by rule or statute." Fed. R. Civ. P. 11(a). However, verification requirements were common in state proceedings through the first half of the twentieth century, especially in States that followed the Field Code's requirement of verified complaints. See Charles E. Clark, *Handbook of the Law of Code Pleading* 216-218 (2d ed. 1947). In those state proceedings and in the few instances in federal practice where verification has been

required, courts consistently held that the absence of verification was a technical defect that could be cured outside the limitation period and did not deprive the court of jurisdiction to act.[3]

The traditional function of verification is to assure the truthfulness of the factual allegations contained in a pleading. See, *e.g.*, *Drury Displays, Inc.* v. *Board of Adjustment*, 760 S.W.2d 112, 114 (Mo. 1988) (en banc) (citation omitted). As the courts have explained, however, the verification is not itself an allegation or a part of the pleading.[4] Thus, even when a court's jurisdiction depends on certain facts or allegations, verification of those facts or allegations is not necessary to vest jurisdiction in the court.[5] Omission of or errors

[3] As pertinent here, verification was previously required in the federal system for involuntary bankruptcy petitions (see 11 U.S.C. 41(c) (1925); Bankruptcy Act of 1898, ch. 541, § 18(c), 30 Stat. 551), in suits for money against the United States brought in district court (see 28 U.S.C. 762 (1925); Act of Mar. 3, 1887, ch. 359, § 5, 24 Stat. 506), and for petitions for recovery of damages filed in the Claims Court (see 28 U.S.C. 265 (1925); Act of Mar. 3, 1911, ch. 231, § 159, 36 Stat. 1139)). Verification is still required in the federal system in shareholder derivative actions (see Fed. R. Civ. P. 23.1), in support of an *ex parte* request for a temporary restraining order (see Fed. R. Civ. P. 65(b)), in certain *in rem* actions, including forfeiture actions (see 28 U.S.C. App., Supp. Rules C(2)(a) and C(6)(a)(i)), and for removal of actions from state courts (see 28 U.S.C. 1446 (1994 & Supp. V 1999)).

[4] See, *e.g.*, *McMath* v. *Parsons*, 2 N.W. 703, 704 (Minn. 1879); *In re Estate of Sessions*, 341 P.2d 512, 517 (Or. 1959); accord *In re Estate of Shaffer*, 454 P.2d 1, 3 (Kan. 1969); *Chisholm* v. *Vocational Sch. for Girls*, 64 P.2d 838, 842 (Mont. 1936); *In re Interest of L.D.*, 398 N.W.2d 91, 98 (Neb. 1986).

[5] See, *e.g.*, *United Farm Workers of Am.* v. *Agricultural Labor Relations Bd.*, 694 P.2d 138, 139-140 (Cal. 1985) (en banc); *People* v. *Birch Sec. Co.*, 196 P.2d 143, 146 (Cal. Dist. Ct. App. 1948), cert. denied, 336 U.S. 936 (1949); *Easter Seal Soc'y for Disabled Children* v. *Berry*, 627 A.2d 482, 489 (D.C. 1993); *Lincoln Nat'l Bank* v. *Mundinger*, 528 N.E.2d 829, 836 (Ind. Ct. App. 1988); *Workman* v. *Workman*, 46 N.E.2d 718, 724 (Ind. Ct.

in a required verification are technical defects that may be remedied at any time before final judgment, and objection to the lack of verification may be waived if not raised promptly.[6] Accordingly, verification may be supplied by

App. 1943) (en banc); *Chandler* v. *Taylor*, 12 N.W.2d 590, 594 (Iowa 1944); *Rush* v. *Rush*, 46 Iowa 648, 650-651 (1877); *In re Estate of Shaffer*, 454 P.2d at 3; *Patterson* v. *Patterson*, 190 P.2d 887, 889 (Kan. 1948); *Stoltman* v. *Stoltman*, 429 N.W.2d 220, 222 (Mich. Ct. App. 1988); *Commercial Bank & Trust Co.* v. *Jordan*, 278 P. 832, 834 (Mont. 1929); *In re Interest of L.D.*, 398 N.W.2d at 98; *Johnson* v. *Jones*, 2 Neb. 126, 135-137 (1872); *Tehansky* v. *Wilson*, 428 P.2d 375, 375 (Nev. 1967) (per curiam); *Preparatory Temple & House of Prayer for all People, Inc.* v. *Seery*, 195 A.2d 900, 902-903 (N.J. Super. Ct. Ch. Div. 1963); *Miller* v. *Board of Assessors*, 698 N.E.2d 906, 908 (N.Y. 1997); *People ex rel. New York City Omnibus Corp.* v. *Miller*, 24 N.E.2d 722, 723 (N.Y. 1939); *Colonial Storage Mgmt.* v. *Board of Revision*, 679 N.E.2d 313, 314 (Ohio Ct. App. 1996); *In re Estate of Sessions*, 341 P.2d at 516.

[6] *Johnston Broad. Co.* v. *FCC*, 175 F.2d 351, 355 (D.C. Cir. 1949) ("Generally speaking, it seems to be held in the state courts that a statutory requirement for a verified pleading is not jurisdictional but can be waived by the opposing party or cured by amendment."); see also *Ingalls Shipbuilding Corp.* v. *Cahela*, 36 So. 2d 513, 518 (Ala. 1948); *Smith* v. *Meyers*, 253 P.2d 615, 617 (Ariz. 1953); *United Farm Workers*, 694 P.2d at 140; *Lattimer* v. *Ryan*, 20 Cal. 628, 633 (1862); *Arrington* v. *Tupper*, 10 Cal. 464, 464-465 (1858); *Board of Educ.* v. *Mulcahy*, 123 P.2d 114, 118 (Cal. Dist. Ct. App. 1942); *State* v. *Beach*, 103 A. 353, 353 (Del. Super. Ct. 1918); *Mellon Bank, N.A.* v. *Coppage*, 253 S.E.2d 202, 203 (Ga. 1979); *Decker* v. *West*, 273 Ill. App. 532, 536-538 (1934); *Workman*, 46 N.E.2d at 724; *Crist* v. *Tallman*, 179 N.W. 522, 524 (Iowa 1920); *Rush*, 46 Iowa at 651; *Pulliam* v. *Pulliam*, 183 P.2d 220, 222 (Kan. 1947); *Board of Comm'rs* v. *Walter*, 112 P. 599, 600 (Kan. 1911); *Vater* v. *Vater's Adm'rs*, 113 S.W.2d 1145, 1146-1147 (Ky. 1938); *City of Dayton* v. *Hirth*, 87 S.W. 1136, 1137 (Ky. 1905); *Drury Displays*, 760 S.W.2d at 114; *Claussen* v. *Chapin*, 221 P. 1073, 1075 (Mont. 1924); *Miller*, 24 N.E.2d at 723-724; *Kuykendall* v. *Lambert*, 173 P. 657, 658 (Okla. 1918); *Estate of Sessions*, 341 P.2d at 517; *Lewis* v. *Erie Ins. Exch.*, 421 A.2d 1214, 1217 (Pa. Super. Ct. 1980); *State ex rel. Williams* v. *Jones*, 164 S.W.2d 823, 826 (Tenn. 1942); *Industrial State Bank* v. *Engineering Serv. & Equip.*, 612 S.W.2d 661, 663 (Tex. Civ.

later amendment and will relate back to the original unverified complaint.[7]

Federal courts have likewise held that, where verification is required by statute or rule, it may be supplied by amendment and will relate back to the original, unverified pleading.[8] For example, Section 18(c) of the Bankruptcy Act of 1898, ch. 541, 30 Stat. 551, required the vertification of all averments of fact in involuntary bankruptcy petitions. The federal courts uniformly held that failure to verify the facts in the petition was a non-jurisdictional, curable defect.[9] This

App. 1981); *Keister's Ex'rs* v. *Philips' Ex'x*, 98 S.E. 674, 675 (Va. 1919); *Greene* v. *Union Pac. Stages, Inc.*, 45 P.2d 611, 612-613 (Wash. 1935).

[7] See *Cahela*, 36 So.2d at 518; *United Farm Workers*, 694 P.2d at 140; *Easter Seal Society*, 627 A.2d at 489; *Graves* v. *Needham*, 39 N.E.2d 321, 322 (Ill. 1942); *Maliszewski* v. *Human Rights Comm'n*, 646 N.E.2d 625, 626-628 (Ill. App. Ct. 1995); *Mundinger*, 528 N.E.2d at 836; *Workman*, 46 N.E.2d at 724; *Pulliam*, 183 P.2d at 222; *Hirth*, 87 S.W. at 1137; *Southside Civic Ass'n* v. *Warrington*, 635 So.2d 721, 723-724 (La. Ct. App.), petition for writ denied, 639 So. 2d 1168 (La. 1994); *Drury Displays, Inc.*, 760 S.W.2d at 114; *Chisholm*, 64 P.2d at 842; *In re Estate of Sessions*, 341 P.2d at 517; *State ex rel. Williams*, 164 S.W.2d at 826; *Greene*, 45 P.2d at 612; see also *Decker* v. *Board of Educ.*, 380 A.2d 285, 286-287 (N.J. Super. Ct. App. Div. 1977) (relying on agency regulations providing for relation back of verified complaints under New Jersey employment discrimination law), certification denied, 384 A.2d 842 (1978).

[8] See, *e.g.*, *United States* v. *United States Currency in the Amount of $103.387.27*, 863 F.2d 555, 561-562, 563 n.13 (7th Cir. 1988); *United States* v. *1982 Yukon Delta Houseboat*, 774 F.2d 1432, 1436 (9th Cir. 1985); *Johnston Broad. Co.*, 175 F.2d at 355-356; *Lewis* v. *Connett*, 291 F. Supp. 583, 584 (W.D. Ark. 1968); *Tracy* v. *Robbins*, 40 F.R.D. 108, 111, 114 (D.S.C. 1966), appeal dismissed, 373 F.2d 13 (4th Cir. 1967); *Yuri Yajima* v. *United States*, 6 F.R.D. 260, 262 (E.D.N.Y. 1946); *Franzen* v. *E.I. du Pont de Nemours & Co.*, 36 F. Supp. 375, 378 (D.N.J. 1941); *Duran* v. *United States*, 31 Ct. Cl. 353, 358 (1896); *Griffin* v. *United States*, 13 Ct. Cl. 257, 258-259 (1877).

[9] *In re Royal Circle of Friends Bldg. Corp.*, 159 F.2d 539, 541 (7th Cir. 1947); *Harris* v. *Mills Novelty Co.*, 106 F.2d 976, 978 (10th Cir. 1939);

Court sustained that practice in *Armstrong* v. *Fernandez*, 208 U.S. 324, 327 (1908), where it noted that the bankruptcy court had allowed verification of the petition *nunc pro tunc* and found no error in the district court's action.

This widespread practice demonstrates that, contrary to the court of appeals' reading of Title VII, a statutory requirement that a charge must be verified does not mean that verification must occur within the statute of limitations period for filing a complaint, or that an unverified complaint is not a valid "charge" within the meaning of the statute. Of course, Congress could have departed from the common-law rule by imposing a specific time limit on verifications. But in the absence of such an express provision, there is no reason to think that Congress intended to depart from that widely recognized rule.[10]

Adhering to the EEOC rule permitting verification after the filing date has passed is particularly appropriate in the context of Title VII. This Court has emphasized that Title

Leidigh Carriage Co. v. *Stengel*, 95 F. 637, 641 (6th Cir. 1899); *In re Robbins*, 292 F. 653, 654 (S.D. Fla. 1923); *In re Farthing*, 202 F. 557, 566-567 (E.D.N.C. 1913); *In re Bellah*, 116 F. 69, 77 (D. Del. 1902); *Green River Deposit Bank*, 110 F. at 138.

[10] There is only very limited authority in the state courts to the contrary. In *Griffith* v. *Adams*, 52 A. 66, 68 (1902), the Maryland Court of Appeals stated that unverified complaints are "nullities, to which no legal effect could be given." The court did not directly address the question whether amendment would be permissible, however, and the rule in question explicitly authorized courts to grant extensions of time to file the required verification "for good cause shown." *Ibid.* Other cases similarly held only that unverified complaints *may* be disregarded, not that they must be. See 49 C.J. § 825 & n.53 (1930) (citing cases). In the special context of election contests, some courts have held that the verification requirement is jurisdictional, such that failure to file a verified petition within the relevant time period is an absolute bar. See *Dinwiddie* v. *Board of County Comm'rs*, 708 P.2d 1043, 1046 (N.M. 1985), cert. denied, 476 U.S. 1117 (1986).

VII's charge-filing requirements should be interpreted in light of the remedial purposes of the statute and the fact that its administrative processes are frequently invoked by laypersons without legal training or assistance. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 818 (1980) (Title VII "was enacted to implement the congressional policy against discriminatory employment practices," and "that basic policy must inform construction of this remedial legislation"); *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (cautioning against "technical reading" of charge-filing provisions because "laymen, unassisted by trained lawyers, initiate the process"); *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972) (a highly technical reading of the charge-filing requirements is "particularly inappropriate in a statutory scheme [like Title VII] in which laymen, unassisted by trained lawyers, initiate the process"); see also *EEOC* v. *Commercial Office Prods. Co.*, 486 U.S. 107, 123-124 (1988); cf. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 761 (1979) (making similar observations with respect to Age Discrimination in Employment Act of 1967).

C. The Commission's Regulation Is Reasonable And Entitled To Deference

1. The background principle of law in this area so clearly establishes that a verification may relate back to the initial complaint that the court of appeals' contrary reading of Title VII should be rejected in light of the absence of any suggestion that Congress intended to depart from the traditional rule. At a minimum, however, the court of appeals clearly erred in concluding that Title VII's plain language compelled rejection of that well-established rule. Accordingly, to the extent the statutory language does not resolve the "precise question" at issue in this case, the Court should defer to the Commission's regulation. See *Chevron*, 467 U.S.

at 842-843; see also *Commercial Office Prods.*, 486 U.S. at 115; *Oscar Mayer & Co.*, 441 U.S. at 761.

Deference to the Commission's implementation of Title VII is particularly appropriate in this case for several reasons. First, Congress expressly delegated to EEOC the authority to "issue * * * suitable procedural regulations to carry out the provisions of" Title VII. 42 U.S.C. 2000e-12(a). Congress has thus "explicitly left a gap for the agency to fill, [and] there is an express delegation of authority to the agency." *Chevron*, 467 U.S. at 843-844. Moreover, the Commission formally published the regulation in the Code of Federal Regulations and the Federal Register, rather than informally articulating it in a policy statement or enforcement guideline. See 31 Fed. Reg. 10,269 (1966); 37 Fed. Reg. 9215 (1972); 42 Fed. Reg. 55,388 (1977). Accordingly, the Commission's procedural regulation is binding "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001); see also *Commercial Office Prods.*, 486 U.S. at 125 (O'Connor, J., concurring) (deference to EEOC is "particularly appropriate" where regulation involves a "technical issue of agency procedure").[11]

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[11] Because this case involves an express delegation of authority to the Commission to issue regulations, there should be no dispute that *Chevron* deference is applicable. See *Mead*, 121 S. Ct. at 2172 (a "very good indicator of delegation meriting *Chevron* treatment" is "express congressional authorizations to engage in the process of rulemaking"). That is true even though the regulation at issue was not the product of notice-and-comment rulemaking. The Administrative Procedure Act does not require a notice of proposed rulemaking for "rules of agency organization, procedure, or practice." 5 U.S.C. 553(b)(A). And unlike more informal interpretive rules and guidelines that have received only "some deference" (see *Mead*, 121 S. Ct. at 2175; *Reno* v. *Koray*, 515 U.S. 50, 61 (1995)), this case involves a formal published regulation that is binding on the Commission. See also *Mead*, 121 S. Ct. at 2173 (making clear that want of notice and comment does not preclude *Chevron* deference).

Second, the regulation reflects the Commission's long-standing and consistently-held interpretation of Title VII. Cf. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) (EEOC's "contemporaneous construction" of Title VII procedural issue "deserves special deference when it has remained consistent over a long period of time"). The charge and relation-back provisions now found at 29 C.F.R. 1601.12(b) were initially promulgated in 1966, just two years after Title VII became law. See 29 C.F.R. 1601.11 (1966); 31 Fed. Reg. 10,269 (1966). The substance of the regulation has remained essentially unchanged, with only minor changes in citation and wording. Moreover, although Congress has enacted several sets of amendments to Title VII, including amendments to Section 706(b) in 1972, it has never disapproved the regulation by adding a limitation requirement in Section 706(b) or a verification requirement in Section 706(e). Cf. *Associated Dry Goods*, 449 U.S. at 600 n.17 (Congress's failure to disapprove EEOC regulation "suggests its consent to the Commission's practice").[12]

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[12] Moreover, before the 1972 amendments, courts of appeals had uniformly held, consistent with EEOC's 1966 regulation, that charges could be verified outside the charge-filing period. See *Blue Bell Boots, Inc.* v. *EEOC*, 418 F.2d 355, 357 (6th Cir. 1969); *Weeks* v. *Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 230-231 (5th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 360 (7th Cir. 1968). By 1990, when Congress incorporated Title VII's procedural requirements into the ADA (see p. 2, *supra*), all of the circuits that had addressed the issue had upheld EEOC's regulation permitting a verification made outside the limitation period to relate back to a timely-filed but unverified charge. See *Peterson* v. *City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990); *Casavantes* v. *California State Univ.*, 732 F.2d 1441, 1443 (9th Cir. 1984); *Weeks*, *supra*. The first court of appeals decision to the contrary was *Schlueter* v. *Anheuser-Busch, Inc.*, 132 F.3d 455, 458 (8th Cir. 1998); see also *Hodges* v. *Northwest Airlines, Inc.*, 990 F.2d 1030 (8th Cir. 1993) (concluding that unverified charge was not timely filed with state agency).

2. The Commission's regulation reflects a reasonable interpretation of Title VII. The regulation is not contrary to anything in the text of the statute and is consistent with well-established background legal principles. It is also fully consistent with the interests served by Title VII's charge, verification, and limitation requirements. The main purpose of a charge is to put EEOC on notice that the respondent may have engaged in conduct that violates federal anti-discrimination law. Under Title VII and Title I of the ADA, EEOC (unlike other federal agencies with enforcement

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Some courts recently have questioned whether, in the 1972 amendments to Section 706(b), Congress intended to convert the verification provision from a technical and directory measure to one that is substantive and mandatory. See *Vason* v. *City of Montgomery*, 240 F.3d 905, 907 n.2 (11th Cir. 2001) (per curiam). Those courts, however, have misunderstood the thrust of the 1972 amendments. Congress rewrote Section 706(b) in 1972 to permit charges to be filed "on behalf of" aggrieved persons as well as "by" aggrieved persons, and extended the verification requirement to all charges, including Commissioner's charges and the new "on-behalf-of" charges. The new, more complex provisions for filing charges required reorganization of the statutory language. Compare 42 U.S.C. 2000e-5(a) (1970) ("Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission[,] * * * the Commission shall furnish [the respondent] * * * with a copy of such charge[.]") with 42 U.S.C. 2000e-5(b) (1994) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission * * * , the Commission shall serve a notice of the charge * * * on [the respondent]. Charges shall be in writing under oath or affirmation[.]"). The scant legislative history of that amendment indicates that Congress understood the principal change to be that verification would be required in Commissioner's charges and "on-behalf-of" charges; it does not suggest that Congress understood that, before the amendment, verification was not required in charges filed by individuals claiming discrimination. See 118 Cong. Rec. 7167 (1972) (section-by-section analysis prepared by Sens. Williams and Javits). Moreover, nothing in the legislative history suggests that verification must occur within the charge-filing period.

powers) may investigate only matters that are tied to charges of discrimination that have been filed with the Commission. See *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 64, 68 (1984). That purpose is fulfilled if the charge is "sufficiently precise to identify the parties, and to describe generally the action or practices complained of," with the minimum level of specificity required by 29 C.F.R. 1601.12(b). A charge need not also be verified to alert EEOC to potential discrimination that may warrant investigation.

The verification requirement serves to impress on complainants the gravity of filing a charge and to ensure that employers are not harassed by frivolous charges. *Blue Bell Boots, Inc.*, 418 F.2d at 357; cf. *Shell Oil*, 466 U.S. at 76 n.32 (explaining that, in Section 706(b), the "function of an oath is to impress upon its taker an awareness of his duty to tell the truth"). The employer's interests are fully protected where, as here, the charge is verified before the employer is required to cooperate in the investigation. See *Peterson* v. *City of Wichita*, 888 F.2d 1307, 1309 (10th Cir. 1989), cert. denied, 495 U.S. 932 (1990); cf. *Shell Oil*, 466 U.S. at 64 (charge that meets the requirements set forth in Section 706(b) is prerequisite to judicial enforcement of an EEOC subpoena); see also 42 U.S.C. 2000e-5(b) (requiring service of notice of charge on employer within 10 days).

Title VII's limitation periods, "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights," are designed to "protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll.* v. *Ricks*, 449 U.S. 250, 256-257 (1980). The charge itself, even if unverified, represents an assertion of the victim's rights. A complainant who, in compliance with EEOC's regulations, submits a detailed letter to the Commission within the applicable time period and explains the factual basis for his claim of discrimination cannot be said to have slept on his rights.

Furthermore, the deadlines imposed by the statute ensure that, even when the charge is formally verified after the limitation period has expired, employers will not need to defend decisions that are long past. In sum, the regulation "honor[s] the remedial purpose of the legislation as a whole without rejecting the particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes*, 455 U.S. at 398.

3. The regulation also reflects the Commission's practical experience with processing charges of discrimination. First, as this Court has recognized (pp. 17-18, *supra*), most individuals who contact the EEOC to complain about alleged employment discrimination are laypersons acting without legal training or assistance. Those complainants are not likely to know, at least when they initially contact the Commission, that a complaint of discrimination must be verified by oath or affirmation to be treated as a formal charge of discrimination.

Second, the limitation periods for filing an administrative charge of discrimination with EEOC are relatively short: 180 days after the alleged unlawful employment practice, or 300 days in States and localities with qualified employment-discrimination agencies (see note 1, *supra*). As there are only 50 EEOC district, area, and local offices in the United States, most complainants necessarily make initial contact with the Commission by letter or telephone.[13] Complainants often send letters to the EEOC near the end of the limitation period, intending thereby to file charges of discrimination, without being aware that the charge must be verified. The regulation protects those persons if they have asserted their

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[13] For example, the Seattle District Office handles charges from Alaska, Idaho, and Oregon as well as Washington; the Denver District Office covers not only Colorado but also Montana, Wyoming, Nebraska, North Dakota, and South Dakota.

rights in a timely fashion. It also preserves the Commission's jurisdiction to investigate allegations of discrimination, which it could not do if the charge were deemed to be untimely. See *Shell Oil*, 466 U.S. at 64.[14]

Third, because most complainants to EEOC are laypersons, EEOC has long found it useful to have Commission staff prepare a short formal charge of discrimination (the Form 5) for the complainant to review and to execute under oath or affirmation, once the staff has distilled the essence of the allegations from contacts with the complainant. This practice simplifies EEOC's enforcement of Title VII by focusing the complainant's allegation as well as the inquiry that EEOC then makes of the employer. The process of transferring the individual's allegations to a Form 5 Charge of Discrimination ready for execution and verification often involves correspondence by mail between the Commission and the complainant. That process may take several weeks.

Thus, practical considerations strongly support the Commission's relation-back regulation. Even when a complainant sends the Commission a detailed written letter setting forth the basis for his allegation of discrimination well within the statutory limitation period, the complainant is unlikely to know of the verification requirement, and it will often be

[14] When an individual initially contacts EEOC by telephone, a member of the Commission staff may discuss the matter with the caller to make sure that the person's complaint is not more appropriately directed to another agency (such as the Department of Labor or the National Labor Relations Board), and then typically sends that person an intake sheet or questionnaire to fill out in his own words and to return to the Commission. Once that intake sheet or questionnaire is returned to EEOC, a Commission staff person will then examine the case further, may schedule an interview with the complainant (in person or by telephone), and may eventually prepare a Form 5 Charge of Discrimination for the complainant to verify and execute. Under the EEOC regulation at issue here, a complainant's telephone call may not be treated as a charge of discrimination; a charge must be in writing. See 29 C.F.R. 1601.12(b).

impossible for the Commission to prepare, and the complainant to verify, a Form 5 Charge of Discrimination before the short limitation period expires. If such an initial written (but unverified) submission to the Commission did not toll the statute of limitations for filing a charge, EEOC would likely lose the opportunity to investigate allegations of discrimination in many cases, and individuals would lose the opportunity to obtain relief as well.

The Commission's regulation also accommodates the fact that other federal, state, and local agencies also have jurisdiction over employment-discrimination complaints. As noted above (note 1, *supra*), in deferral jurisdictions, the Commission must defer to the qualified state or local agency for 60 days before processing a charge unless the state or local proceedings conclude earlier. 42 U.S.C. 2000e-5(c). If a Title VII charge is filed initially with EEOC, the Commission may refer the charge to such a state or local agency for processing. See *Commercial Office Prods.*, 486 U.S. at 110-112. Some States, including Virginia where this case originated, do not have a verification requirement for employment-discrimination complaints. See 22 Va. Admin. Code § 25-10-20 (1990) (defining "complaint" to mean "a written statement by a person * * * alleging an act of discrimination" prohibited by state law), § 25-10-50 (listing required contents of complaint but not including verification). The EEOC's regulation permits it to refer unverified charges to state and local agencies. See 29 C.F.R. 1601.13(a)(4)(i). Those State and local agencies can then determine whether they may take action on an unverified charge under state or local law. The court of appeals' decision, however, might prevent EEOC from referring unverified charges to state and local agencies, under the reasoning an unverified charge was not a "charge" at all within the meaning of Title VII, even if those state and local agencies do not require verification for their own purposes.

In addition, federal agencies, such as the Department of Labor, that administer other anti-discrimination provisions and other federal labor laws often receive charges that should be handled by EEOC. Those agencies typically forward such charges to the Commission. Many of the referred charges are unverified, in part because the anti-discrimination provisions that those other federal agencies enforce do not require verification. See, *e.g.*, 41 C.F.R. 60-1.23 (Department of Labor regulation governing complaints under anti-discrimination provisions of Executive Order No. 11,246 does not require verification). Under the EEOC regulation, charges that are timely filed with another agency and are then referred to the Commission may be considered timely filed under Title VII, even if the transfer process is time-consuming and verification occurs outside the limitation period for filing charges with EEOC. That approach ensures that persons who seek relief for alleged employment discrimination do not mistakenly forfeit their rights.

* * * * *

In short, although Title VII provides a statute of limitations for filing charges and separately requires that a charge be verified, Title VII does not include a statute of limitations for verification. Nothing in the text or legislative history of the statute suggests that verification must occur within the limitation period for filing charges, and the background legal principle establishes the opposite presumption—that verification may occur outside the limitation period for filing a complaint and will relate back to a timely filed complaint. EEOC's regulation is consistent with that background rule and furthers the purposes of the charge-filing, limitation, and verification provisions of Title VII. Accordingly, that regulation should be upheld.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case remanded for further proceedings.

Respectfully submitted.

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In the Supreme Court of the United States

LEONARD EDELMAN,

Petitioner,

v.

LYNCHBURG COLLEGE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: *Pollard v. E.I. du Pont de Nemours & Co.*, No 00-763 (U.S. June 4, 2001); *Reeves v. Sanderson Plumbing Products*, 530 U.S. ___, 120 S. Ct. 2097 (2000); *Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S.Ct. 2275 (1998); and *Burlington Industries v. Ellerth*, ___ U.S. ___, 118 S.Ct. 2257 (1998).

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[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* NELA states that with the exception that counsel for petitioner, Eric Schnapper, is a member of NELA and, as such, pays general membership dues, no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

NELA has a compelling interest in ensuring that the goals of Title VII of the Civil Rights Act of 1965, as amended, are fully realized. Liberal interpretation of the laws against employment discrimination is not only appropriate, but required in light of their remedial, preventive, and deterrent purposes. In the present case, NELA is concerned that the Fourth Circuit improperly has read into the language of Title VII a requirement that materially weakens the statute's substantive protections by limiting the ability of unsophisticated charging parties to cure technical defects that, under the decision below, render their charges invalid.

It is important to remember that at least in the initial stages of the administrative process, most people who believe they have been victimized by employment discrimination will not be represented by counsel and may have only the vaguest notion of their rights and obligations under the nation's civil rights laws. Additionally, an individual who has just gone through the extremely traumatic experience of being fired from a job, rejected for promotion, or as in Edelman's case, denied the opportunity to continue his career, or other life-changing adverse employment action is likely to be in a highly emotional state. The realization that their employer may have broken faith by discriminating against them may dawn only slowly and reluctantly on those who have invested years of loyalty in an enterprise they love. In such circumstances, affected individuals are likely to rely heavily on EEOC forms and instructions and at the time of submission are unlikely to even be aware that a Title VII charge must be verified, let alone that there is a time limit.

Contrary to the conclusion of the Fourth Circuit, there is no congressional mandate that for a timely filed

charge of discrimination to be valid, the statutory verification requirement must be fulfilled within the limitations period. Indeed, such a requirement would frustrate rather than further the salutary goals of Title VII and other civil rights laws for which it is the model. Moreover, the conclusion of the court below is compelled not by the plain meaning of the words of the statute, but by an overly restrictive view of the law that is completely at odds with the remedial purposes of the civil rights protections Congress intended.

On the other hand, the Equal Employment Opportunity Commission's (EEOC)'s longstanding interpretation of the statutory language to allow post-limitations verification of a timely filed charge as expressly set forth in the regulation at issue is not only reasonable, but compelling in light of the congressional purposes underlying the enactment of Title VII. Additionally, this interpretation, embraced by the majority of the circuits that have considered the issue, further serves those purposes through its refusal to victimize charging parties a second time by laying a trap for the unwary in the form of a verification requirement that elevates form over substance.

For the foregoing reasons NELA files this brief *amicus curiae* in support of Petitioner.

SUMMARY OF ARGUMENT

The statutory language of Title VII upon which the regulation here at issue is based is capable of more than one interpretation and has been interpreted by other courts and earlier decisions of the Fourth Circuit to permit relation-back of post limitations charge verification.

The plain meaning analysis invoked by the court below to invalidate the regulation is, therefore, inapplicable. Precisely because the meaning of the statutory language is not plain and unambiguous, the court below was required, in accordance with the guidance provided by this Court, to assess the validity of the regulation in light of the statutory context and legislative purposes. Since that analysis confirms that the regulation is a permissible construction of the statutory language consistent with its purposes, the regulation is valid. Therefore, petitioner's timely filed charge alleging a violation of Title VII that, pursuant to the EEOC regulation, was subsequently verified after the running of the statutory limitations period complied with the requirements of Title VII.

ARGUMENT

I. The Court Below Erroneously Concluded That The Meaning Of The Title VII Language At Issue Is Plain And Unambiguous.

Title VII provides that "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. §2000e-5(b). Another section establishes the limitations period within which a charge must be filed as 180 days after the alleged discrimination or, in a "deferral state," 300 days. 42 U.S.C. §2000e-5(e)(1). The regulation at issue, 29 C.F.R. §1601.12 (b), provides, in part: "[a] charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments . . . will relate back to the date the charge was first received." Even though Title VII does

not define the term "charge," the court below concluded that under the "plain meaning" rule of *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997), the two foregoing separate sections of the statute reflect the "unambiguously expressed intent of Congress" under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), that for a charge alleging a violation of Title VII to be valid, it must be verified within the statutory limitations period. *Edelman v. Lynchburg College*, 228 F.3d 503, 507 (4th Cir. 2000). Thus, the court below held the regulation invalid because "to the extent that the regulation permits a charge to be verified after the expiration of the limitations period, it thwarts the plain language of Title VII." 228 F.3d at 508.

This conclusion is erroneous. The statutory language clearly does not satisfy the *Robinson* "plain meaning" standard because it is, if anything, silent on the question of the timing of the verification requirement. At a minimum, the language is ambiguous. In either event, pursuant to *Chevron*, the court may not ignore the EEOC's administrative interpretation of the statutory language and simply impose its own construction as the Fourth Circuit did here. Rather, the court must determine whether the effect given to the statute under the agency's regulatory authority is a permissible construction of the language at issue. *Chevron*, 467 U.S. at 842-43.

In *Robinson*, a Title VII case, this Court was confronted with the issue of whether Congress intended the protections of the statute to apply to former employees. Specifically, the statutory construction question in *Robinson* was whether in using the term "employees" in one section of the statute Congress meant to restrict the Act's substantive protections to only current employees. "The plainness or ambiguity of statutory language is

determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Applying those principles, *Robinson* concluded that the term "employees" as used in the statute was ambiguous, *id.*, and that broader context of the statute as well as the purpose of the statute as a whole compelled the conclusion that Congress intended an inclusive interpretation of the statutory language so that the term "employees" encompasses former employees. *Id.* at 347.

Although *Robinson* compels a three-part analysis to determine the meaning of statutory language, the court below, relied exclusively on the first *Robinson* principle:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Id. at 340, quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989). Applying this standard, the Fourth Circuit concluded that the *only* possible meaning of the language of 42 U.S.C. §2000e-5(b) that "charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires," is that "if a discrimination claim is not in writing, under oath or affirmation, containing the information and in the form required by the Commission, it is not a charge." 228 F.3d at 508. The court went on to hold that "[b]ecause a charge requires verification and because a charge must be filed within

the limitations period, it follows that a charge must be verified within the limitations period." 228 F.3d at 508 (citations omitted).

The statutory language stating the content and verification requirements, however, contains no reference to their timing. The limitations language does not refer to verification. Thus, as pointed out in Judge Luttig's opinion concurring in the result, it does not necessarily follow that all the elements identified by the court as constituting a charge must be satisfied within the limitations period:

> [T]here is not necessarily the nexus required in order to sustain the plain meaning interpretation advanced in the opinion. That is to say, it seems to me at least plausible to read the first statute [42 U.S.C. §e-5(e)(1)] simply to require that a charge be filed within 180 days, and the second [42 U.S.C. §2000e-5(b)] as freestanding of the first, and simply to require that, before a charge is finalized, all of the allegations and information required by the EEOC be provided and verified.

228 F.3d at 512 (Luttig, Circuit Judge, concurring). Thus, not even the court below could agree on the "plain and unambiguous" meaning of the Title VII language.

Further, the meaning of the language that two of three Fourth Circuit judges found to plainly mandate verification within the limitations period has been widely interpreted in precisely the opposite manner under an analysis remarkably similar to *Robinson*'s three-part analysis. The fact that the circuits are split 4-2 over the timing of the verification requirement undermines the Fourth Circuit's conclusion that since the meaning of the statutory language is plain and unambiguous, courts

need not look beyond it. Indeed, prior to handing down the decision in this case, the Fourth Circuit was part of the circuit majority that endorsed the regulation it has now rejected and criticized a district court for "ignor[ing] the recent conclusion of this Circuit approving the very use of the regulation that [plaintiff], joined by the EEOC urges: allowing her verified claim to amend and relate back to the date her unverified claims was filed." *Tinsley v. First Union National Bank*, 155 F.3d 435, 439 n. 2 (4th Cir. 1998) (citing *Balasz v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994)). Apparently, the court found nothing inconsistent between its conclusion in *Balasz* that "a reasonable construction of the regulation would simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC files," *Balasz*, 32 F.3d at 157, and its conclusion here that "a reasonable construction *must be imposed* on the regulation, one which does not allow relation-back of the verification requirement beyond the time limitation prescribed by Congress." 228 F.3d at 509 (emphasis added). Additionally, this latter conclusion is inconsistent with *Chevron*, since, if the meaning of the statutory language is plain as the court below found, the regulation is invalid and, thus, no construction of it is reasonable. It is only when the meaning of the statutory language is unclear, that the court may proceed to the second *Chevron* step and, in that event, it may not "impose" its own construction on the regulation, no matter how reasonable, but must determine only whether the agency's construction is "permissible." *See Chevron*, 467 U.S. at 842-43.

Even though all the circuit court decisions that have upheld the "relation back" doctrine of the EEOC regulation as a permissible interpretation of the statute pre-

ceded *Robinson*, every one considered the specific context in which the language is used as well as the broader legislative purposes of the statute. Implicit in these decisions is a rejection of the "plain meaning" analysis employed by the court below, since the principle underlying these decisions is that Title VII is remedial legislation to be construed liberally rather than technically. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982). Indeed, "[c]ertain well-established principles govern our assessment of the sufficiency of [a] charge," *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74, 79 (5th Cir. 1982), the most important of which is that "[c]onsistent with the remedial purposes underlying Title VII, we construe employment discrimination charges with the utmost liberality." *Id.*; *see Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 323 (7th Cir. 1991) ("First, Title VII is remedial legislation which must be construed liberally.") Further, "bearing in mind that such charges are generally prepared by laymen untutored in the rules of pleading," *Price*, 687 F.2d at 79, "courts should avoid technical interpretations of [Title VII]'s procedural provisions which would defeat those remedial purposes." *Philbin*, 929 F.2d at 323; *see Casavantes v. California State University, Sacramento*, 732 F.2d 1441, 1442 (9th Cir. 1984) (emphasizing "the importance of non-technical interpretations of the procedural requirements inherent in the processing of discrimination claims.") The court below acknowledged that its holding conflicts with these decisions, but disagreed with them on the ground that they "improperly substitute policy justifications for clear statutory language." 228 F.3d at 511. To the contrary, it is the ambiguous nature of the statutory language that mandates further inquiry into the statutory context to ascertain congressional intent.

Those courts that have upheld the relation back doctrine have also relied on "the principal function of the administrative charge: the provision of an adequate factual basis for the Commission's initiation of the investigation and conciliatory procedures contemplated by Title VII." *Price*, 687 F.2d at 78. The relevant EEOC regulation states that "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. §1601.12(b). Whether verification occurs before or after the limitations period is of little moment to a respondent who is charged with discrimination, since the EEOC does not proceed to investigate a charge until it is verified. *See Peterson v. City of Wichita, Kan.*, 888 F.2d 1307, 1309 (10th Cir. 1989). On the other hand, instead of imposing a strict verification requirement based exclusively on an interpretation of the statutory language rejected by a majority of the circuits, applying a less restrictive, but equally plausible construction of the words of the statute "recognizes the remedial nature of the statute and does not prejudice an unwary victim of discrimination by insistence upon a formal requirement which can be supplied before the respondent is brought into the picture." *Blue Bell Boots, Inc. v. EEOC*, 418 F.2d 355, 357 (6th Cir. 1969); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 76 n. 32 (1984) (the "function of an oath is to impress upon its taker an awareness of his duty to tell the truth.") As long as the charge is sworn to or affirmed before the respondent employer is required to respond to the investigation, that purpose is satisfied.

As demonstrated primarily by the holdings of the circuit majority, the conclusion of the court below that

the meaning of the statutory language of Title VII regarding the timing of the verification requirement is plain and unambiguous is incorrect. The court was, therefore, wrong to not proceed to the second step of the *Chevron* analysis and consider whether the EEOC regulation as applied under the circumstances demonstrates a permissible construction of the statute.

II. The EEOC Regulation Is a Reasonable Exercise of the Agency's Title VII Authority Over the Procedural Requirements for the Proper Filing and Treatment of Administrative Charges.

Pursuant to *Chevron*, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Thus, the EEOC regulation should be upheld if it is a reasonable exercise of the authority granted to the agency under the statute. In fact, this Court has stated that "it is axiomatic that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards. Rather, the EEOC's interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). As pointed out by the government,[2] deference is particularly appropriate in this case because the regulation was adopted in 1966,

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[2] *Leonard Edelman, Petitioner v. Lynchburg College, On Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit, Brief For The United States And The Equal Employment Opportunity Commission As Amici Curiae* at 14-15.

soon after the enactment of Title VII and, although there have been minor changes, the substance of the regulation has remained in force ever since. Indeed, this Court has acknowledged that the EEOC's "contemporaneous construction" of Title VII "deserves special deference when it has remained consistent over a long period of time." *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981).

Based on its erroneous conclusion that the statutory language has one plain meaning, the court below found that it did not need to proceed with the second step of the *Chevron* analysis. This conclusion was also erroneous. Since the statute actually is silent or at the least ambiguous, *Chevron* compels the court to assess whether the regulation is a permissible implementation of the statutory language. Four circuits as well as the Fourth Circuit prior to this case have found it to be so. Under Title VII, filing an administrative charge with the EEOC initiates "an integrated, multi-step enforcement procedure" that enables the EEOC to detect and remedy various discriminatory employment practices. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 61-62 (1984). This process includes notice to the employer within a specified time period that a charge has been filed and the Commission's investigation of the charge. *See id.* at 63. *See also Pijenburg v. West Georgia Health System, Inc.*, 255 F.3d 1304 (11th Cir. 2001), 2001 U.S. App. LEXIS 15060 at *6 ("[A] charge, in addition to triggering the running of the statute of limitations, serves two significant functions: (1) notification to the employer that a discrimination charge has been lodged with the EEOC: and (2) initiation of the agency's investigation of the complaint.") "The limitations periods [of Title VII], while guaranteeing the protection of the civil rights laws to those who promptly

assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256 (1980). The verification requirement is intended to prevent harassment of employers with frivolous charges. *See Blue Bell Boots v. EEOC*, 418 F.2d 355, 357 (6th Cir. 1969). The regulation providing for relation-back of the charging party's post-limitations period verification of a charge filed within the applicable limitations period is reasonable and consistent both with the purposes of the statutory charge-filing requirement and the statute of limitations. The regulation embodies a construction of the Title VII requirements that "is particularly appropriate 'in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 450, 460 (1979), quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972).

CONCLUSION

The court below erroneously concluded that two separate sections of Title VII, the first describing the requirements for a valid charge and the second prescribing the limitations period, when read together had a plain and unambiguous meaning that precludes verification of a charge after the limitations period has run to relate back to the date of the timely filed charge as permitted by 29 C.F.R. §1601.12 (b). The court, therefore, held that the regulation was invalid. Since, however, the Title VII language at issue is, if anything, silent, or at best, ambiguous regarding the timing of charge verification, pursuant to *Chevron*, the plain meaning analysis invoked by the court below is completely inapplicable. Due

to the fact that the meaning of the Title VII language at issue is capable of more than one interpretation, this Court should reject the plain meaning analysis. Pursuant to *Chevron*, the Court should reverse the decision below and find that the EEOC regulation is not only reasonable, but also consistent with the statutory purposes of Title VII and, therefore, a valid exercise of the authority vested in the EEOC.

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 00-1072

LEONARD EDELMAN,
Petitioner,

v.

LYNCHBURG COLLEGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The written consent of all parties has been filed with the Clerk of this Court. The brief urges affirmance of the decision below and thus supports the position of Respondent Lynchburg College before this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 360 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to proper interpretation and application of equal employment laws and regulations. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's member companies are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), *as amended*, 42 U.S.C. § 2000e *et seq*., as well as other federal employment nondiscrimination laws enforced by the U.S. Equal Employment Opportunity Commission (EEOC). As employers, and as potential respondents to charges of discrimination under Title VII, EEAC's members have a direct and ongoing interest in the issue presented in this appeal concerning the validity of the EEOC's "relation-back" regulation, 29 C.F.R. § 1601.12(b), which purports to allow an untimely charge of discrimination to "relate-back" to a timely, yet unverified, written submission. The court below properly ruled that the EEOC's relation-back regulation circumvents Title VII's plain and unambiguous charge filing requirements and therefore is invalid as a matter of law.

Because of its interest in the application of the nation's fair employment laws, EEAC has filed over 470 briefs as *amicus curiae* in cases before the Supreme Court, the United States Courts of Appeals, and various state supreme courts. As part of this *amicus* activity, EEAC has filed briefs in

Mohasco Corp. v. Silver, 447 U.S. 807 (1980), and other cases concerning application of Title VII's charge filing requirements.

Thus, EEAC has an ongoing interest in, and a familiarity with, the legal and public policy issues presented to the Court in this case. Because of its significant experience in these matters, EEAC is well situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner Leonard Edelman, a biology professor for Respondent Lynchburg College, was denied tenure on June 6, 1997. *Edelman v. Lynchburg College*, 228 F.3d 503, 505 (4th Cir. 2000). Subsequently, on November 14, 1997, he submitted an unverified correspondence to the EEOC, alleging that the College discriminated against him on the basis of his gender, national origin and religion.[2] *Id.* His letter concluded with the statement, "I hereby file a charge of employment discrimination against Lynchburg College . . . and I call upon the EEOC to investigate this case." *Id.* at 505-06. Edelman's letter was received by the EEOC on November 18, 1997. 228 F.3d at 506.

On November 26, 1997, Edelman, through his attorney, sent a second correspondence to the EEOC requesting a "personal interview with an EEOC investigator prior to the final charging documents being served on the college." *Id.* The letter further indicated that Edelman understood any "delay occasioned by the interview" would not affect the November 14, 1997 "filing date." *Id.*

The EEOC responded by sending Edelman correspondence indicating its need for "additional information in order to investigate his case." *Id.* The letter also urged Edelman to

[2] Edelman is a white Jewish man of Polish national origin.

schedule "an interview 'as soon as possible because a charge of discrimination must be filed within the time limits imposed by law'." *Id.* The EEOC interviewed Edelman on March 3, 1998, and on March 18, the agency mailed him a draft charge for his verified signature. Edelman did not return a verified charge until April 15, 1998, 313 days after the alleged discrimination occurred. *Id.*

Notwithstanding the filing defects, the EEOC served Lynchburg College with notice of the charge and commenced an investigation thereof, at the conclusion of which it issued Edelman a "right-to-sue" notice. *Id.* Edelman then filed an action in Virginia state court alleging, among other things, a cause of action under Title VII. *Id.* Lynchburg College removed the action to federal district court and moved to dismiss on jurisdictional grounds, claiming that Edelman's failure to timely file a charge of discrimination with the EEOC deprived the court of subject matter jurisdiction over the Title VII claim. *Id.* The district court granted the College's motion, and remanded Edelman's remaining claims to Virginia state court. *Edelman v. Lynchburg College*, 66 F. Supp.2d 777, 781-82 (W.D. Va. 1999).

Edelman appealed the dismissal of his Title VII action to the U.S. Court of Appeals for the Fourth Circuit, arguing that under the EEOC's relation-back regulation, his April 15, 1998 charge "related-back" to the November 14, 1997 unverified submission and, as such, was timely filed in accordance with Title VII's charge filing requirements. *Edelman*, 228 F.3d at 507. The Fourth Circuit ruled that Edelman's charge was not filed within the timeframes prescribed by Title VII. *Id.* at 509. It held further that the EEOC's relation-back regulation is contrary to the plain language of the Act and therefore is not entitled to judicial deference. *Id.* at 508-09. On January 2, 2001, Edelman filed a petition for writ of certiorari, which this Court granted on the limited issue of the validity of the EEOC's relation-back regulation. 121 S. Ct. 2547 (2001).

SUMMARY OF ARGUMENT

Title VII expressly provides that a charge "shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (emphasis added). Furthermore, Title VII clearly and unambiguously prescribes the timeframe within which a charge of discrimination must be submitted to the agency for investigation. 42 U.S.C. § 2000e-5(e)(1). Despite this unequivocal statutory language, the EEOC's procedural regulations permit an untimely charge of discrimination to "relate-back" to a timely filed, but unverified submission. 29 C.F.R. § 1601.12(b).

Because Congress has spoken directly on the issue of timely filing of verified charges, and the EEOC's relation-back regulation conflicts with the plain language of the Act and is unreasonable, it is not entitled to judicial deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nor is the EEOC's relation-back doctrine entitled to "persuasive" judicial deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), since it conflicts with other provisions contained in the same procedural scheme, is inconsistent with the EEOC's own charge filing enforcement guidance, and clashes with regulatory guidance issued by the agency contemporaneously with the passage of Title VII. 29 C.F.R. §§ 1601.9, 1601.12(b); EEOC Compl. Man. § 2-IV(A), Charge Filing (May 12, 2000) [3]; 30 Fed. Reg. 8407 (July 1, 1965) (codified at 29 C.F.R. § 1601.5).

The EEOC ordinarily will not, and is not required to, serve notice of an unverified submission on an employer implicated in the complaint. 42 U.S.C. § 2000e-5; Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* on Petition for a Writ of Certiorari, at 16-17. Since the relation-back regulation contains no time limit for

[3] *http://www.eeoc.gov/docs/threshold.html#2-IV-A*

after-the-fact verification, an individual could wait forever and a day to perfect his or her submission and therefore permit it to be served on the named respondent. In fact, the EEOC has waited years to serve respondents with discrimination complaints that were not submitted in accordance with Title VII's charge filing requirements. *E.g.*, *Danley v. Book-of-the-Month Club, Inc.*, 921 F. Supp. 1352 (M.D. Pa. 1996), *aff'd mem.*, 107 F.3d 861 (3d Cir. 1997); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994); *Vason v. City of Montgomery*, 240 F.3d 905 (11th Cir. 2001).

Providing notice of alleged discriminatory acts long after the fact deprives a respondent-employer of the opportunity to conduct a prompt internal investigation of the allegations. It also requires respondents to defend themselves against claims based on incidents that could have occurred years earlier, for which they no longer possess pertinent employment records. Thus, the EEOC's relation-back regulation impedes effective self-monitoring of employment practices and thereby undermines Title VII's well-recognized goals of preventing and correcting workplace discrimination. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998).

ARGUMENT

I. THE EEOC'S RELATION-BACK REGULATION, WHICH PURPORTS TO ALLOW AN UNVERIFIED SUBMISSION TO STAND IN THE PLACE OF A VERIFIED, TIMELY CHARGE, REPRESENTS AN IMPERMISSIBLE EXERCISE OF ADMINISTRATIVE AUTHORITY AND THEREFORE IS NOT ENTITLED TO JUDICIAL DEFERENCE

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "Title VII sets forth 'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)).

Title VII expressly provides that a charge "shall be in writing *under oath or affirmation* and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b) (emphasis added). The EEOC is permitted to investigate alleged employment discrimination under Title VII only upon receipt of a legally sufficient discrimination "charge." 42 U.S.C. § 2000e-5. As this Court has noted, "[t]he Commission's enforcement responsibilities are triggered by the filing of a specific *sworn* charge of discrimination." *University of Pa. v. EEOC*, 493 U.S. 182, 190 (1990) (emphasis added).

Furthermore, Title VII clearly and unambiguously prescribes the timeframe within which a charge of discrimination must be submitted to the agency for investigation:

> A charge under this section *shall* be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice . . . such charge *shall* be filed . . . within three hundred days after the alleged unlawful employment practice occurred . . .

42 U.S.C. § 2000e-5(e)(1) (emphasis added).

Section 1601.12(b) of the EEOC's procedural regulations purports to allow an otherwise untimely filed discrimination charge to be rendered timely by virtue of its "relation-back" to an earlier, timely submission:

> [A] charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge *may* be amended to cure technical defects or omissions, *including failure to verify the charge*, or to clarify and amplify allegations made therein . . . .

29 C.F.R. § 1601.12(b) (emphasis added). Under the regulation, *any* "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," whether verified or not, is elevated to the status of, and for enforcement purposes is indistinguishable from, a charge that complies fully with Title VII's charge filing requirements. *Id.* For the reasons set forth more fully below, the EEOC's relation-back regulation represents an impermissible exercise of administrative authority, is not entitled to judicial deference, and therefore should be invalidated.

A. The EEOC's Relation-Back Regulation Does Not Qualify for Judicial Deference Under the *Chevron* Doctrine

In *Chevron U.S.A. v. Natural Resources Defense Council*, this Court set forth a two-part standard to be applied by courts in assessing the validity of an administrative statutory interpretation:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. 837, 842-43 (1984) (footnotes omitted). Assuming, *arguendo*, that the *Chevron* doctrine applies to procedural regulations such as the one at issue in this case [4], the EEOC's

[4] "The relation-back provision of § 1601.12(b) is undeniably procedural in nature," Brief of Petitioner, at 7, is not subject to formal notice-and-comment rulemaking, *see, e.g.*, 42 Fed. Reg. 42022 (Aug. 19, 1977), and does not carry the force of law. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991). Therefore, *Chevron* deference arguably does not apply. *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) ("We have recognized a very good indicator of delegation meriting *Chevron* treatment in express congressional authorizations to engage in the process of rulemaking or adjudication that produces regulations or rulings for which deference is claimed."); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.")

The fact that the EEOC over the years has issued public notices of proposed changes to its procedural regulations and has solicited public comment thereupon does not alter the non-substantive nature of the regulations. 42 Fed. Reg. 42022 (Aug. 19, 1977); 45 Fed. Reg. 48614 (July 21, 1980); 46 Fed. Reg. 9970 (Jan. 30, 1981); 46 Fed. Reg. 37523 (July 21, 1981); 52 Fed. Reg. 11503 (Apr. 9, 1987). Not only has the agency resorted to such procedures inconsistently, when it *has* sought public comment to proposed revisions to the regulations, its notices have included unequivocal disclaimers that emphasize the agency's exemption from formal notice-and-comment rulemaking requirements. 42 Fed. Reg. 42022 (Aug. 19, 1977).

relation-back rule nonetheless fails to qualify for judicial deference under either prong of that test.

1. The Relation-Back Regulation Conflicts With the Plain Language of the Act

Under the first part of the *Chevron* standard, if Congress has "spoken to the precise question at issue," the agency may not attempt to impose its own interpretation of the matter, and "must give effect to the unambiguously expressed intent of Congress." *Id.* In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992), this Court noted:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'

503 U.S. at 253-54 (citations omitted).

Title VII expressly declares that a charge—which under the Act must be in writing and under oath or affirmation—*shall* be filed with the EEOC within 180 or 300 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). In establishing strict filing deadlines under Title VII, Congress "clearly intended to encourage prompt processing of all charges of employment discrimination" and chose not to legislate any exceptions to the general rule. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). Thus, courts "must respect the compromise embodied in the words chosen by Congress" and may not "alter the balance struck by Congress in procedural statutes by favoring one side or the other in matters of statutory construction." *Id.*

Section 1601.12(b) of the EEOC's procedural regulations purports to allow an otherwise untimely filed discrimination charge to be rendered timely by virtue of its "relation-back"

to an earlier, timely submission that need not be sworn. 29 C.F.R. § 1601.12(b). Under the regulation, *any* "written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," whether verified or not, is elevated to the status of, and for enforcement purposes is indistinguishable from, a charge that complies fully with Title VII's charge filing requirements. *Id.* In fact, the regulation inexplicably places unverified submissions on a higher footing than verified charges that are timely filed, since it *permits*, but does not *require*, after-the-fact verification, an option clearly at odds with Title VII's plain language. *Id.*; 42 U.S.C. § 2000e-5(b).

"Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158, 171 (1989). Since the EEOC's relation-back regulation clearly conflicts with Title VII's plain language, it must be invalidated.

2. The EEOC's Interpretation of Title VII's Charge Filing Requirements Does Not Represent a Reasonable Construction of the Act and Therefore Is Not Entitled to Deference by This Court

Title VII's charge filing requirements are unambiguous. Even if they were not, the EEOC's relation-back regulation nonetheless would fail to qualify for *Chevron* deference because it is unreasonable. If a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843 (footnote omitted). If the agency's interpretation is unreasonable, then it must be invalidated.

Among other things, the EEOC's relation-back regulation effectively nullifies Title VII's filing deadlines by allowing an untimely charge to be rendered timely based on its

relationship to any earlier, unverified written submission. Under the rule, a charging party is under no obligation *ever* to verify his or her written complaint of discrimination as required by Title VII. Moreover, the regulation sets down no timeframe within which this after-the-fact verification is to occur. Thus, filing of a verified charge could occur several months, or even years, after receipt of the unsworn submission and expiration of the statutory filing deadline.

A statutory limitations period is "a clearly legal issue that courts are better equipped to handle." *Bamidele v. INS*, 99 F.3d 557, 561 (3d Cir. 1996) (citations omitted). The EEOC's relation-back regulation, which in effect regulates Title VII's charge filing deadlines out of existence, is well outside of the agency's administrative authority and therefore represents a patently unreasonable construction of the Act.

B. The EEOC's Relation-Back Regulation Is Not Entitled to *Skidmore* Deference

In *Skidmore v. Swift*, 323 U.S. 134 (1944), this Court ruled that an agency's interpretations of a statute it is authorized to administer, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. at 140. In determining what level of deference is to be accorded administrative interpretations of statutory law, courts applying *Skidmore* have considered "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991) (citations and internal quotations omitted). Such an approach "has produced a spectrum of judicial responses, from great respect at one end . . . to near indifference at the other." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2172 (2001) (citations omitted).

Applying the *Skidmore* factors to the EEOC's relation-back regulation, it is clear that the regulation lacks any persuasive authority and therefore is not entitled to judicial deference, however slight, from this Court.

1. The EEOC's Relation-Back Doctrine Conflicts With the Agency's Other Title VII Regulatory Provisions

Section 1601.9 of the EEOC's procedural regulations requires that "a charge *shall* be in writing and signed and shall be verified," while Section 1601.12(b) of the same regulatory scheme provides that "a charge *may* be amended to cure technical defects or omissions, *including failure to verify the charge*." 29 C.F.R. §§ 1601.9, 1601.12(b) (emphasis added). Reading the regulations as a whole, they *require*, on the one hand, that a charge be signed and verified. On the other hand, the regulations merely *permit*, but do not mandate, after-the-fact perfection of an unverified submission, where the subsequent, verified charge on which the submission presumably was based is not timely filed. Thus, an unverified submission is permitted under Section 1601.12(b) to stand as a charge, even if no effort ever is made to satisfy the verification requirements contained in Section 1601.9 of the regulations. *Id.*

Because the EEOC's regulation directly conflicts with other provisions within the same body of regulations, it lacks even the slightest "power to persuade" and therefore is not entitled to *Skidmore* deference.

2. The Relation-Back Rule Is Inconsistent With Regulatory Guidance Issued Contemporaneously With Passage of the Act

The EEOC's original Title VII procedural regulations, first promulgated on July 1, 1965, provided:

> The Commission will receive information concerning alleged violations of this title from any person. Where the information discloses that a person is entitled to file a charge with the Commission, the appropriate office will render him assistance in the filing of a charge.

30 Fed. Reg. 8407, 8408 (July 1, 1965) (codified at 29 C.F.R. § 1601.5). Section 1601.5 of the 1965 regulations clearly distinguished between a "charge" and other "information" the EEOC may receive regarding alleged discrimination, which may be used to assist in the filing of a charge, but which does not, of itself, constitute a valid charging document. 29 C.F.R. § 1601.5 (1965). The regulations also provided that a "charge," as distinguished from other information received by the agency, "shall be in writing and signed, and shall be sworn to . . . ." 29 C.F.R. § 1601.8 (1965).

Significantly, the 1965 regulations did not contain, and made no reference to, the relation-back provision at issue in this case.[5] 29 C.F.R. § 1601.11(a)-(e) (1965). It was not

[5] The 1965 provision most analogous to the one at issue in the instant case provided, in whole:

> § 1601.11 Contents.
>
> Each charge should contain the following:
>
> The full name and address of the person making the charge;
>
> The full name and address of the person against whom the charge is made (hereinafter referred to as the respondent);
>
> A clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practice;
>
> If known, the approximate number of employees of the respondent employer or the approximate number of members of the respondent labor organization, as the case may be;
>
> A statement disclosing whether the proceedings involving the alleged unlawful employment practice have been commenced before a State or local authority charged with the enforcement of fair employment practice laws, and, if so, the date of such commencement and the name of the authority.

29 C.F.R. § 1601.11(a)-(e) (1965).

until the following year, on July 29, 1966, that the agency amended the regulations to include the new rule. 31 Fed. Reg. 10269 (July 29, 1966) (codified at 29 C.F.R. § 1601.11(b)).

When the EEOC first promulgated the procedural regulations in 1965, it clearly understood that only written, sworn submissions are entitled under Title VII's plain language to be considered "charges." The agency's subsequent adoption of the relation-back "policy," which in effect negates Title VII's verification requirement, represents an inexplicable change in position that deserves not even the slightest level of judicial deference from this Court.

3. The EEOC's Relation-Back Doctrine Conflicts With the Agency's Own Policy Guidance on Title VII Charge Filing

In Section 2 of its new Compliance Manual on "Threshold Issues,"[6] the EEOC acknowledges that timely filing of a charge is a jurisdictional prerequisite to investigation, barring only extraordinary equitable considerations. It provides:

> Ordinarily, a charge must be filed within the statutory limitations period. The filing deadline can occasionally be extended when equitable considerations demand or when the parties agree to waive the deadline. . . . Under Title VII . . . a charging party must file a charge with the EEOC within either 180 or 300 days of the alleged unlawful employment practice, depending upon whether the alleged violations occurred in a jurisdiction that has a state or local fair employment practices agency (FEPA)

[6] *http://www.eeoc.gov/docs/threshold.html*

> with the authority to grant or seek relief. . . . Because most jurisdictions have FEPAs, the limitations period will usually be 300 days.

EEOC Compl. Man. § 2-IV, Timeliness (May 12, 2000) (footnotes omitted). It provides further:

> When a charge is filed with the Commission, the assigned investigator ordinarily will determine whether certain threshold requirements are satisfied *before* considering the merits of the discrimination claims . . . If a charge does not satisfy threshold requirements, it should be dismissed.

EEOC Compl. Man. § 2-I, Overview (May 12, 2000) (footnotes omitted).

In its new enforcement guidance, the EEOC concedes that in the absence of extraordinary equitable considerations or express waiver by the parties of applicable filing deadlines, the 180/300-day statutory timeframe for filing a Title VII charge of discrimination may not be tolled or extended. EEOC Compl. Man. § 2-IV(D), Extending the Timeframe for Filing (May 12, 2000). As the agency notes, the doctrine of equitable tolling may be applied where a charging party's "excusable lack of knowledge about the EEO process or the alleged violation" caused the filing delay. *Id.*

Similarly, equitable estoppel may be used to excuse an untimely filing attributable to an employer's misconduct, on which the charging party relied to his or her detriment in failing to timely file a discrimination charge. *Id.* Finally, as the EEOC's guidance instructs, the 180/300-day charge filing limitations period may be waived, by mutual agreement, in order to facilitate private settlement negotiations. *Id.*

Significantly, nowhere in the guidance does the EEOC suggest, as its procedural regulations purport to provide, that a charge filing deadline may be extended to allow a charging party the convenience of verifying, and therefore "perfecting," a defective submission, regardless of the reason for the delay. Moreover, unlike the EEOC's regulations, none of the equitable principles under which a charge filing deadline may be extended alter the fundamental character of a charge, which Congress plainly and expressly declared must be submitted in writing *and* under oath or affirmation.

Nor do those principles relieve a charging party of his or her responsibility to file a charge within the applicable time limitations period. Rather, they provide an opportunity for a reviewing court—not the EEOC itself—to excuse a party's noncompliance based on equitable considerations, which this Court expressly has ruled are equally applicable to Title VII discrimination charges as they are to other legal actions. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

Because the EEOC's relation-back regulation cannot be reconciled either with its enforcement guidance and policy regarding threshold Title VII charge filing requirements or other provisions contained in the same regulatory scheme, it is not entitled to any judicial deference under *Skidmore*.

II. ALLOWING THE EEOC TO CIRCUMVENT TITLE VII'S 300-DAY VERIFIED CHARGE FILING REQUIREMENT WOULD LIMIT EMPLOYERS' ABILITY TO TIMELY ADDRESS, AND THEREFORE UNDERMINE TITLE VII'S PRIMARY GOAL OF ERADICATING, EMPLOYMENT DISCRIMINATION

Title VII expressly requires the EEOC to serve an employer with notice of a charge of discrimination within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). The statutory notice provision exists for good reason. "[T]he principal objective of the provision seems to have been to provide employers fair notice that accusations of discrimination have been leveled against them and that they can soon expect an investigation by the EEOC." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 74 (1984).

The EEOC ordinarily will not serve prospective respondents with intake questionnaires or other preliminary documents that have not been verified. Brief for the United States and the Equal Employment Opportunity Commission as *Amici Curiae* on Petition for a Writ of Certiorari, at 16-17. Under the relation-back rule, verification of such submissions—which the agency then will treat as "charges"—is permitted to occur outside of the statutory 180/300 day filing limitations period. Since the regulation does not place time limits on after-the-fact verification, a non-compliant charging party could wait months, or years, to perfect an unverified submission. "Carried to its logical conclusion, under the EEOC's interpretation of its regulation, it would *never* be too late to verify a charge . . ." *Balazs v. Liebenthal*, 32 F.3d 151, 157 (4th Cir. 1994) (emphasis added).

In fact, the EEOC has investigated and even issued right to sue notices on discrimination complaints that *never* were verified. *Danley v. Book-of-the-Month Club, Inc.*, 921 F. Supp. 1352 (M.D. Pa. 1996), *aff'd mem.*, 107 F.3d 861 (3d Cir. 1997); *Balazs v. Liebenthal*, 32 F.3d 151 (4th Cir. 1994); *Vason v. City of Montgomery*, 240 F.3d 905 (11th Cir. 2001). In *Danley v. Book-of-the-Month Club, Inc.*, for instance, the plaintiff submitted an unverified correspondence to the EEOC "indicating that she sought to lodge a formal complaint against BOMC and requesting that her charge be filed with the Pennsylvania Human Relations Commission." 921 F. Supp. at 1353. The EEOC did not provide the respondent with notice of the discrimination complaint for over two years, until the day that it issued the plaintiff a right-to-sue letter. *Id.*

Delaying notice of alleged discriminatory acts until well after the fact deprives a respondent-employer of the opportunity to detect and correct potentially discriminatory employment practices in a timely and efficient manner, and thus undercuts Title VII's primary goal of preventing

unlawful discrimination. "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms [which] would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764 (1998) (citations omitted). The EEOC's relation-back regulation undermines the Act's strong "deterrent purpose" by impeding early detection and resolution by respondents of potentially discriminatory employment practices. *Id.*

Absent timely notice, respondents also must defend themselves against claims based on incidents that could have occurred years earlier, for which they no longer possess pertinent employment records. Many corporate record retention policies, for instance, permit the destruction of routine personnel forms and employment documents after a set period of time. Even under the EEOC's own record retention regulations, an employer, unaware of the existence of a discrimination claim, may purge information that it ultimately may need to defend against the unknown claim. 29 C.F.R. § 1602.14. The EEOC's regulations provide, in relevant part:

> Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later. . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney

> General, against an employer under title [sic] VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

29 C.F.R. § 1602.14. Thus, even the EEOC's own regulations permit a respondent who otherwise has no knowledge that a charge has been filed against it to destroy relevant employment records after only a year.

Were the EEOC's relation-back regulation permitted to stand, employers would be faced with the unenviable choice of destroying employment records, in accordance with the EEOC's record retention regulations and in the absence of knowledge of a discrimination charge, or retaining, *indefinitely*, literally thousands and thousands of pieces of paper in the event a charge *ever* is filed.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed in its entirety.

Respectfully submitted,

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